IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

74-115

Supreme Court, U. S.
FILED
AUG 13 1974
MICHAEL RODAK, JR., C

MARY STEWART POWELL, PETITIONER

vs.

WILLIAM K. ROGERS, Deputy Commissioner, United States Employees' Compensation Commission, 13th Compensation District; STATE COMPENSATION INSURANCE FUND,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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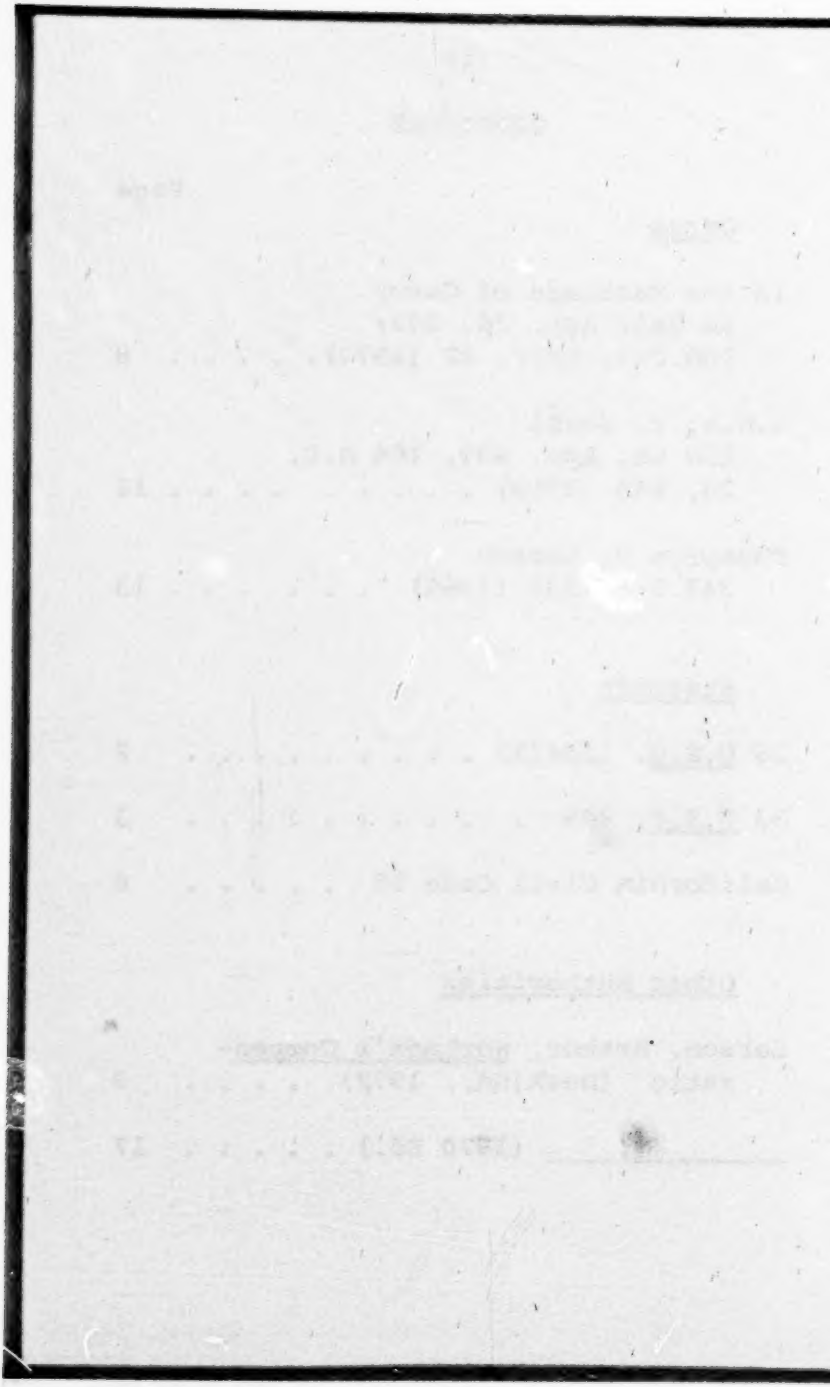

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, MARY STEWART POWELL, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 16, 1974.

OPINION BELOW

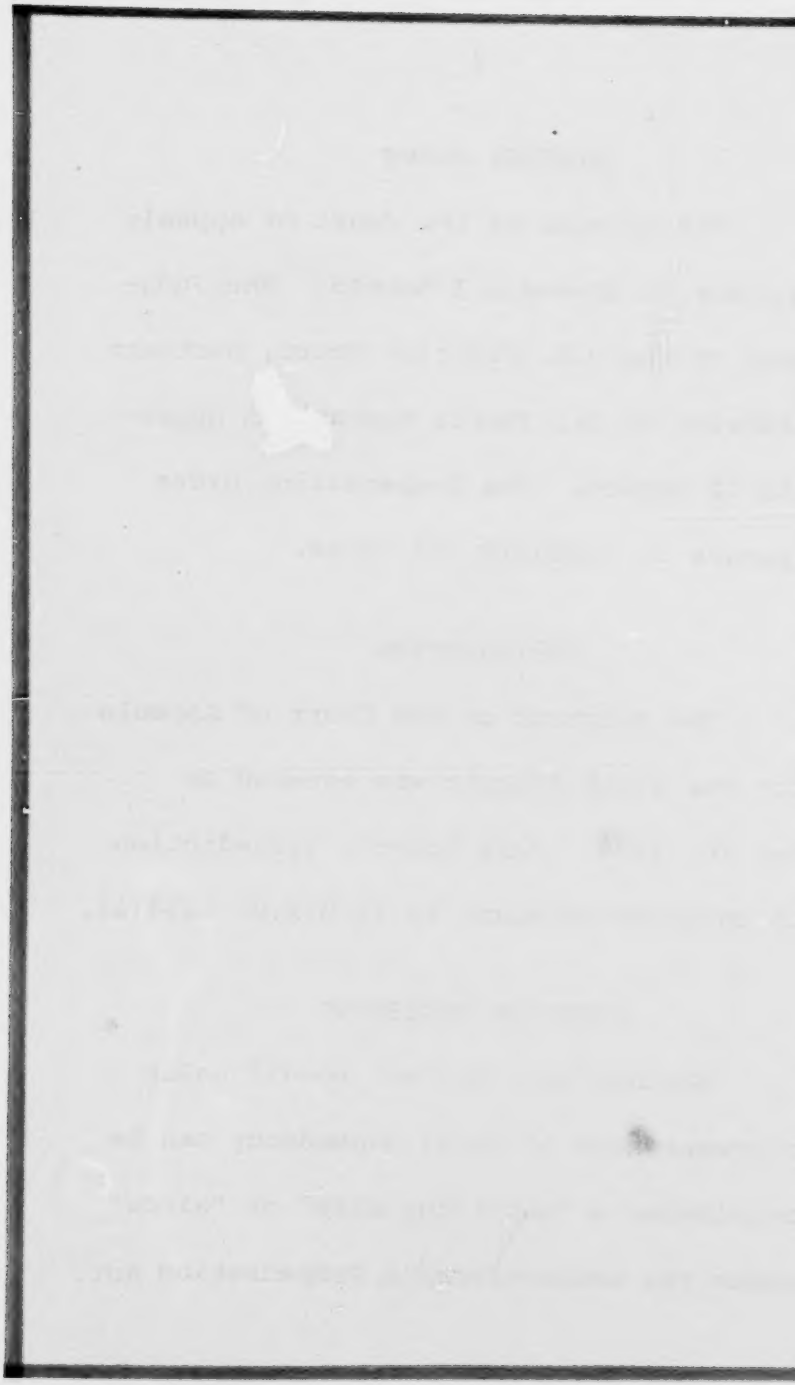
The Opinion of the Court of Appeals appears in Appendix I hereto. The Judgment of the U.S. District Court, Northern District of California appears in Appendix II hereto. The Compensation Order appears in Appendix III herto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 16, 1974. This Court's jurisdiction is involved pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Mary Stewart Powell under circumstances of total dependency can be considered a "surviving wife" or "widow" under the Longshoreman's Compensation Act.



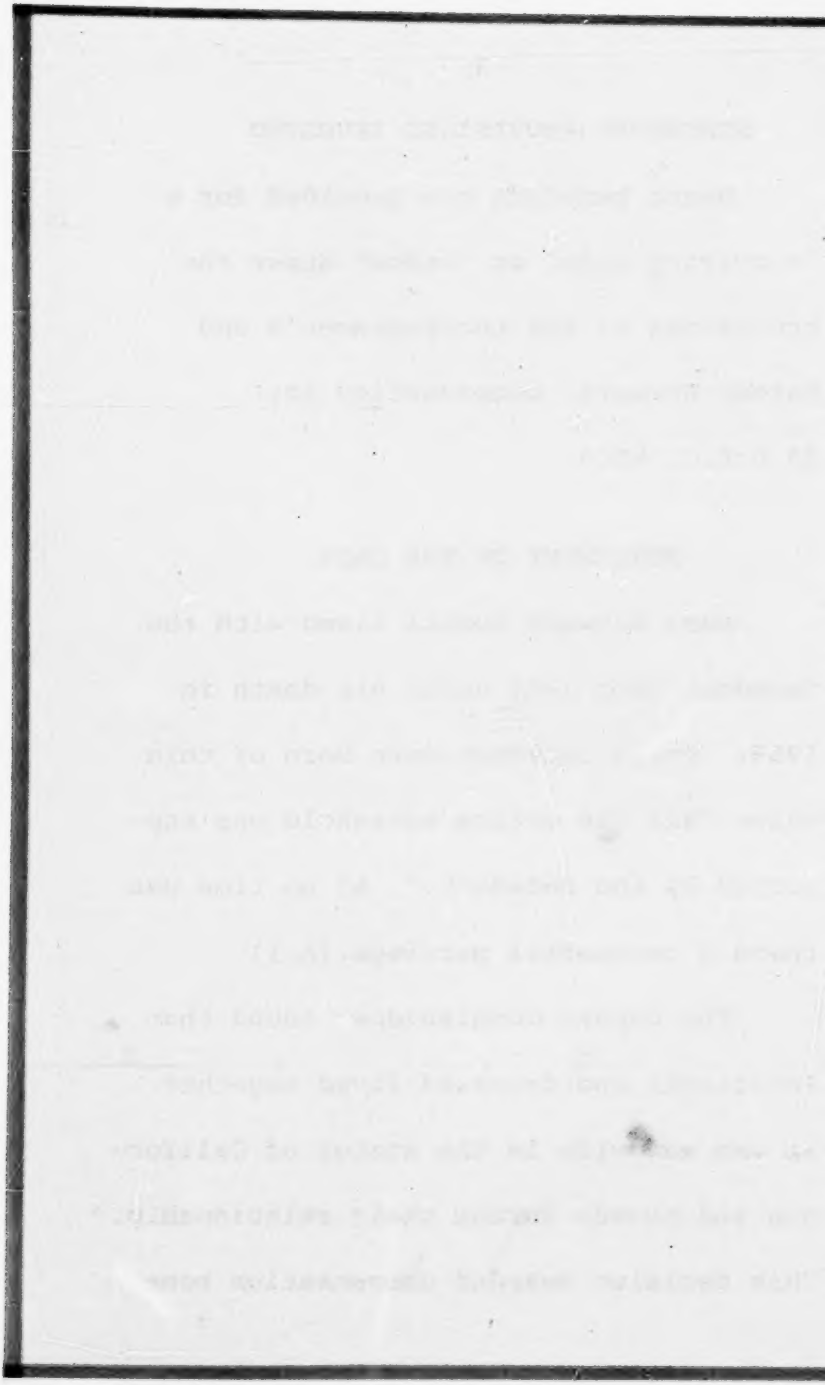
STATUTORY PROVISIONS INVOLVED

Death benefits are provided for a "surviving wife" or "widow" under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. #909.

STATEMENT OF THE CASE

Mary Stewart Powell lived with the decedent from 1955 until his death in 1969. Three children were born of this union "and the entire household was supported by the decedent." At no time was there a ceremonial marriage.(A-I)

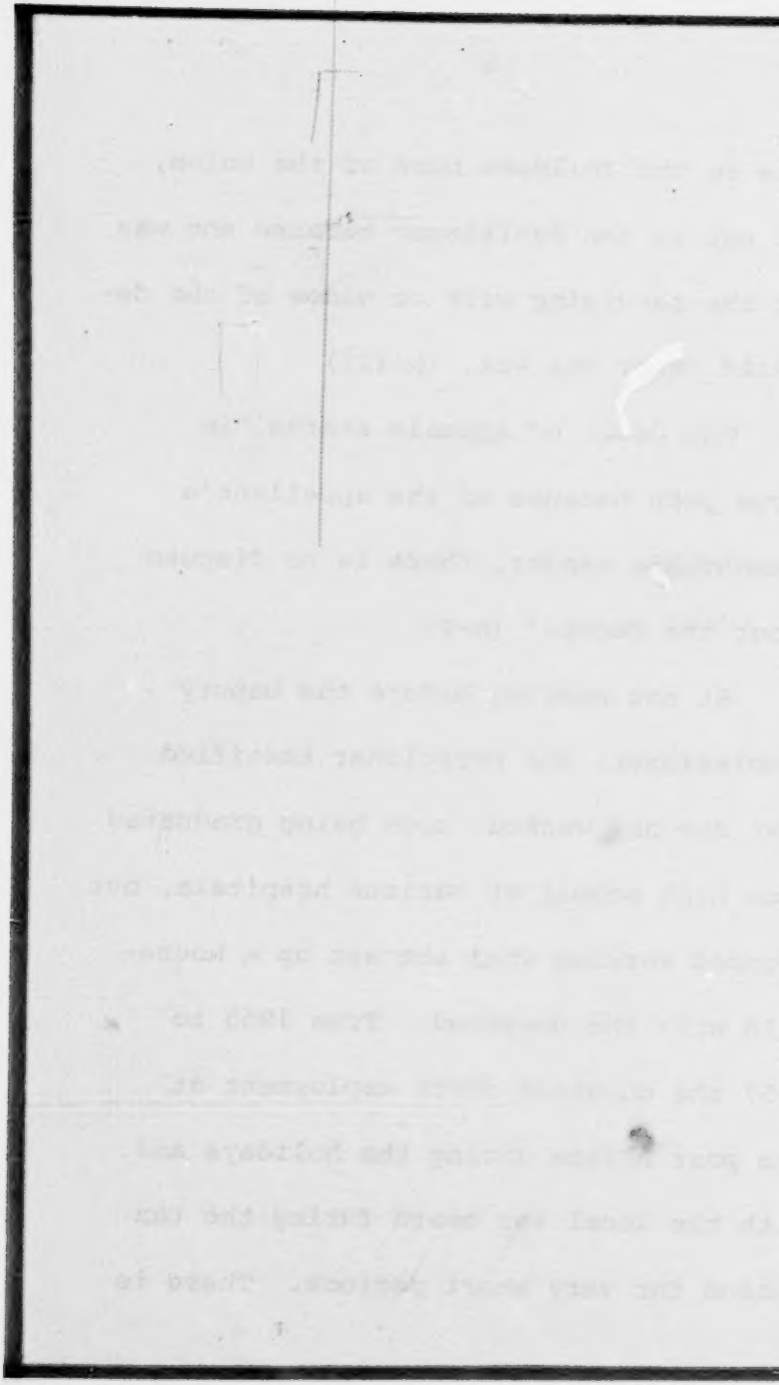
The Deputy Commissioner found that Petitioner and deceased lived together as man and wife in the states of California and Nevada during their relationship. This decision awarded compensation bene-



fits to the children born of the union, but not to the Petitioner because she was not the surviving wife or widow of the deceased under the Act. (A-III)

The Court of Appeals states "in large part because of the appellant's commendable candor, there is no dispute about the facts." (A-I)

At the hearing before the Deputy Commissioner, the Petitioner testified that she had worked upon being graduated from high school at various hospitals, but stopped working when she set up a household with the deceased. From 1955 to 1957 she obtained short employment at the post office during the holidays and with the local tax board furing the tax season for very short periods. There is



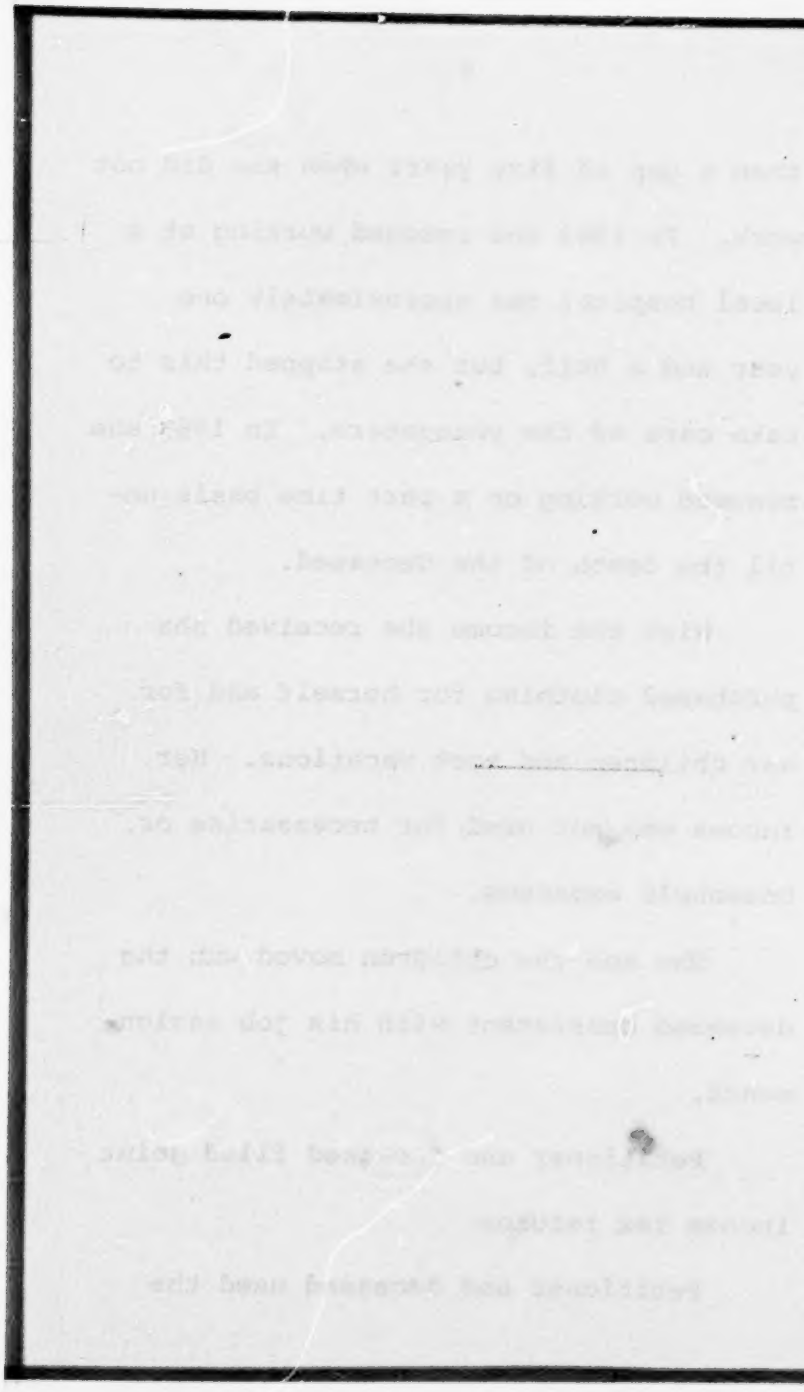
then a gap of five years when she did not work. In 1963 she resumed working at a local hospital for approximately one year and a half, but she stopped this to take care of the youngsters. In 1968 she resumed working on a part time basis until the death of the deceased.

With the income she received she purchased clothing for herself and for her children and took vacations. Her income was not used for necessaries or household expenses.

She and the children moved with the deceased consistent with his job assignments.

Petitioner and deceased filed joint income tax returns.

Petitioner and deceased used the

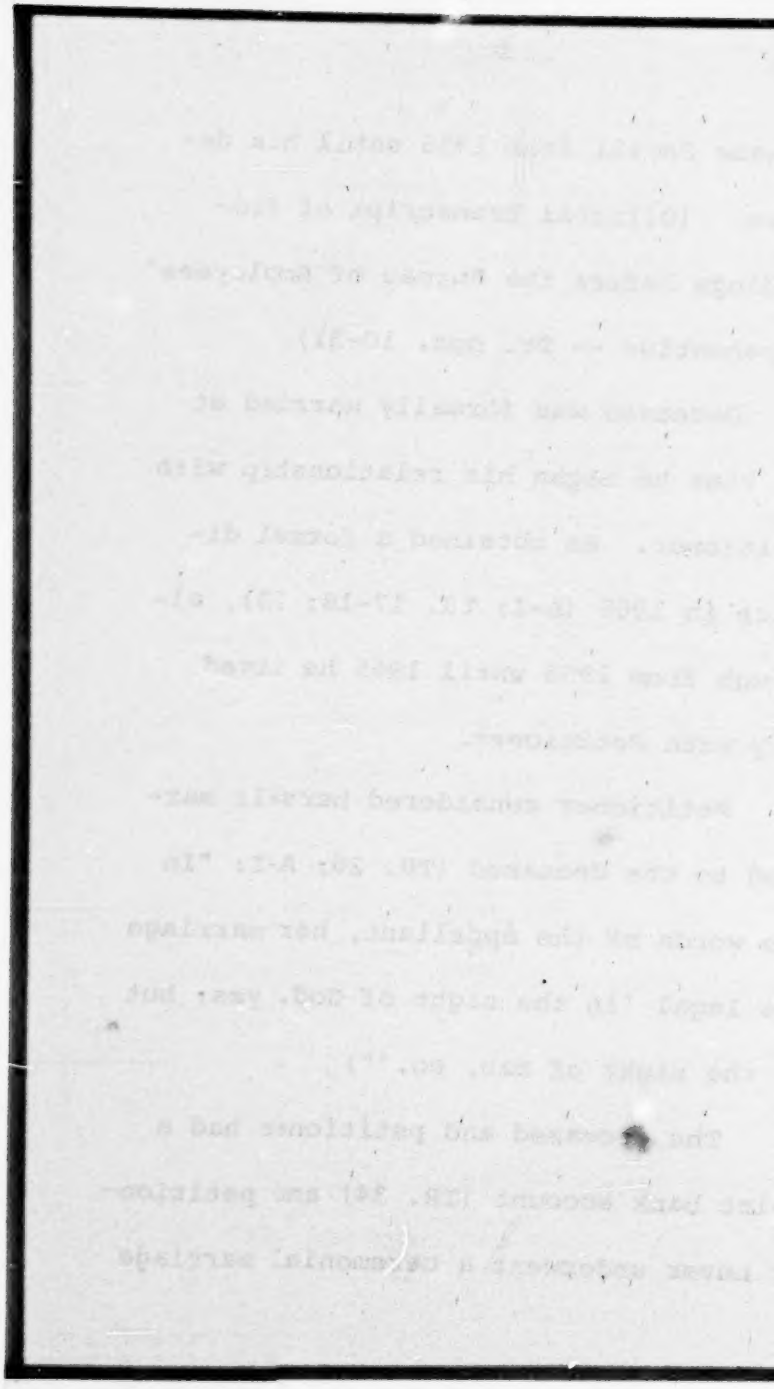


surname Powell from 1955 until his decease. (Official Transcript of Proceedings before the Bureau of Employees' Compensation -- Tr. pps. 10-31)

Deceased was formally married at the time he began his relationship with Petitioner. He obtained a formal divorce in 1965 (A-I; TR. 17-18; 23), although from 1955 until 1965 he lived only with Petitioner.

Petitioner considered herself married to the deceased (TR. 26; A-I: "In the words of the appellant, her marriage was legal 'in the sight of God, yes; but in the sight of man, no.'")

The deceased and petitioner had a joint bank account (TR. 34) and petitioner never underwent a ceremonial marriage



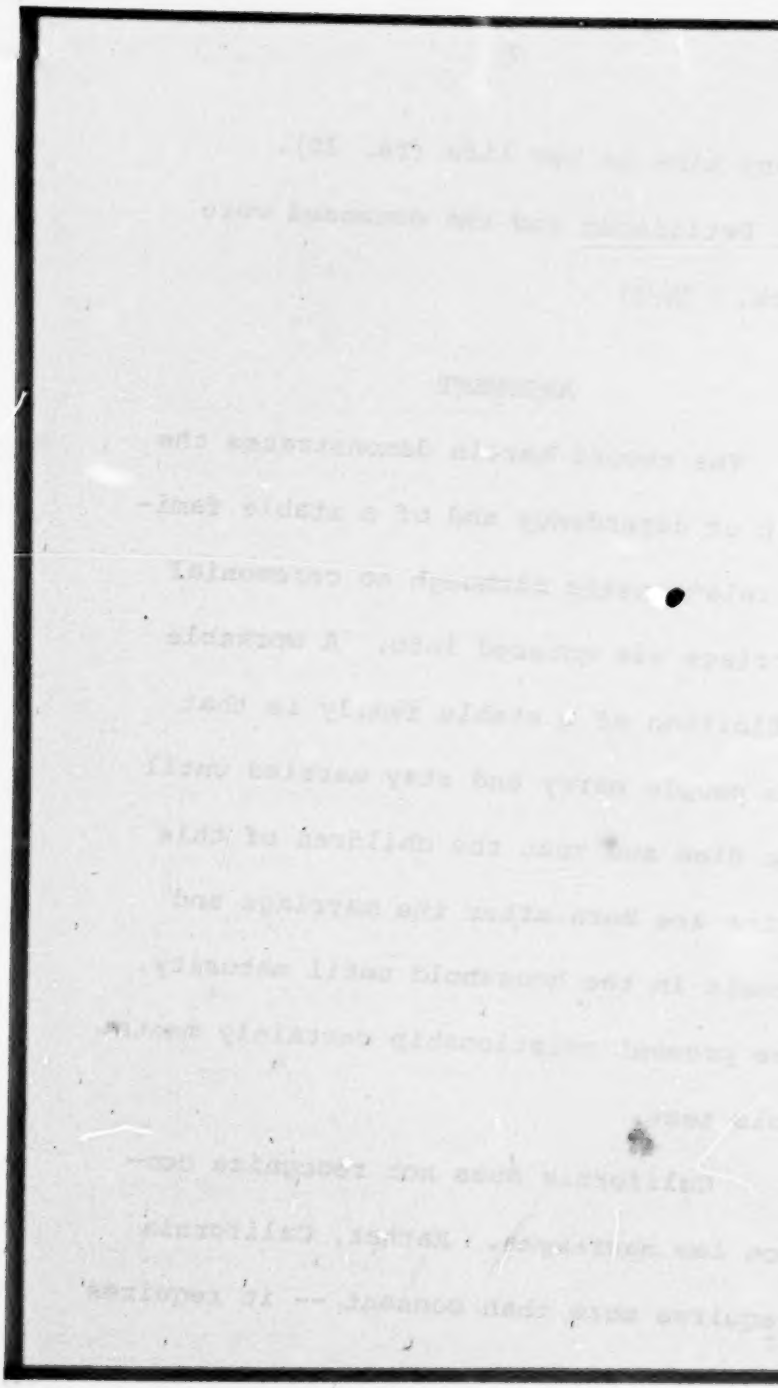
at any time in her life (TR. 35).

Petitioner and the deceased were Black. (A-I)

ARGUMENT

The record herein demonstrates the fact of dependency and of a stable family relationship although no ceremonial marriage was entered into. A workable definition of a stable family is that two people marry and stay married until one dies and that the children of this union are born after the marriage and remain in the household until maturity. The present relationship certainly meets this test.

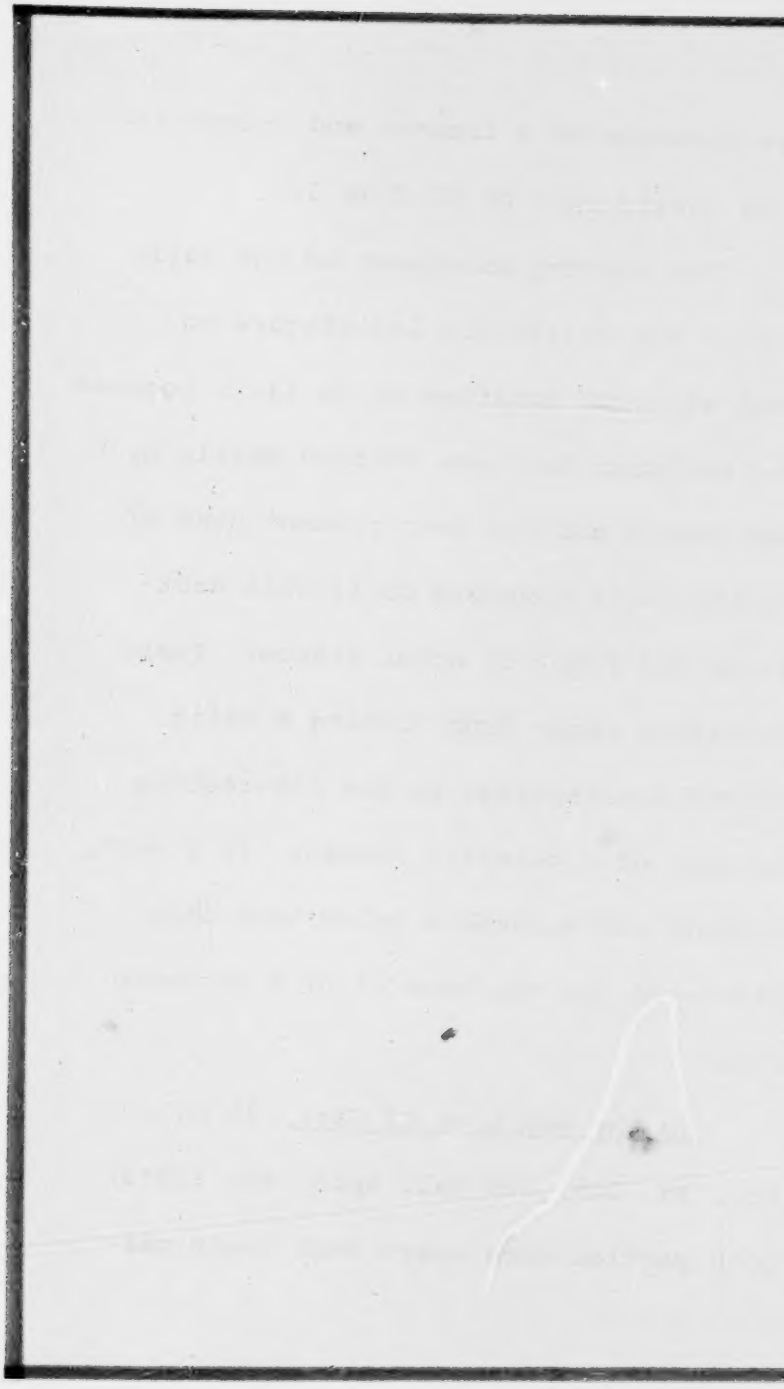
California does not recognize common law marriages. Rather, California requires more than consent -- it requires



the issuance of a license and solemnization (California Civil Code 55).

The seeming harshness of the failure of the California legislature to deal with the equities of de facto spouses and children has been handled fairly by the courts and the ever present hand of equity fills numerous California decisions and those of other states. These decisions range from finding a valid common law marriage to the interesting concept of a putative spouse. In a word, liberal and equitable rules have been fashioned for the benefit of a de facto wife.

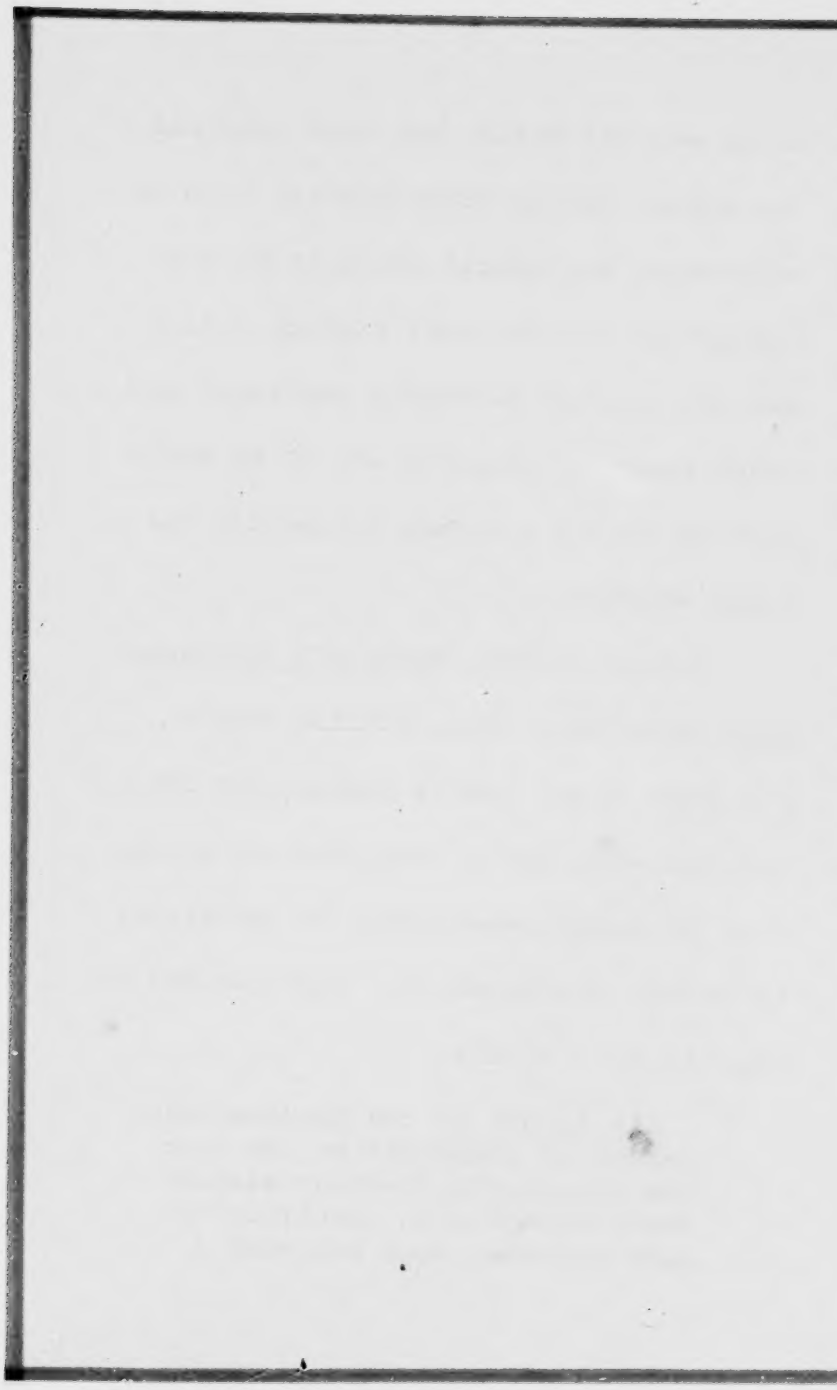
In the Marriage of Cary, 34 Cal. App. 3d. 345, 109 Cal. Rptr. 862 (1973) both parties were aware that their mar-



riage was not valid, but they acquired "an actual family relationship, with cohabitation and mutual recognition and assumption of the usual rights, duties and obligations attending marriage" and found that the property was to be dealt with as though a formal ceremonial marriage existed.

Arthur Larson, Workmen's Compensation (Desk Ed., 1972, Matthew Bender, New York, N.Y.) neatly summarizes the problem existing in this factual situation of actual dependency vs. morality. He writes (Citations omitted) Sec.#63.40, pps. 11-19 - 11-21):

> It is one of the fundamental tenets of compensation law that the claimant's fault or misconduct, except when specifically made defense, does not work a



forfeiture of rights to which he is otherwise entitled. The application of this tenet to the issue of dependency would necessitate the conclusion that a showing of actual dependency may not be defeated by proof of the immoral character of the relationship out of which the dependency grew. This view, while accepted by some courts, is rejected by others on the ground that it offends public policy and undermines the basic institutions of society. The issue is relatively noncontroversial when the claimant in good faith marries a man who, unknown to her, already has a living wife. It has frequently been held that this relationship plus actual dependency will support an award. The problem assumes more difficult form when the claimant herself knew the facts making the relationship illicit, but nevertheless lived in complete, long-continued, and outwardly respectable dependency on deceased. The facts in a Maryland case illustrate the issue perfectly, and the majority and dissenting opinions likewise illustrate the two conflicting judicial responses evoked by the facts. Claimant, at a time when she was already a widow with five children, met the deceased, who also had been previously married

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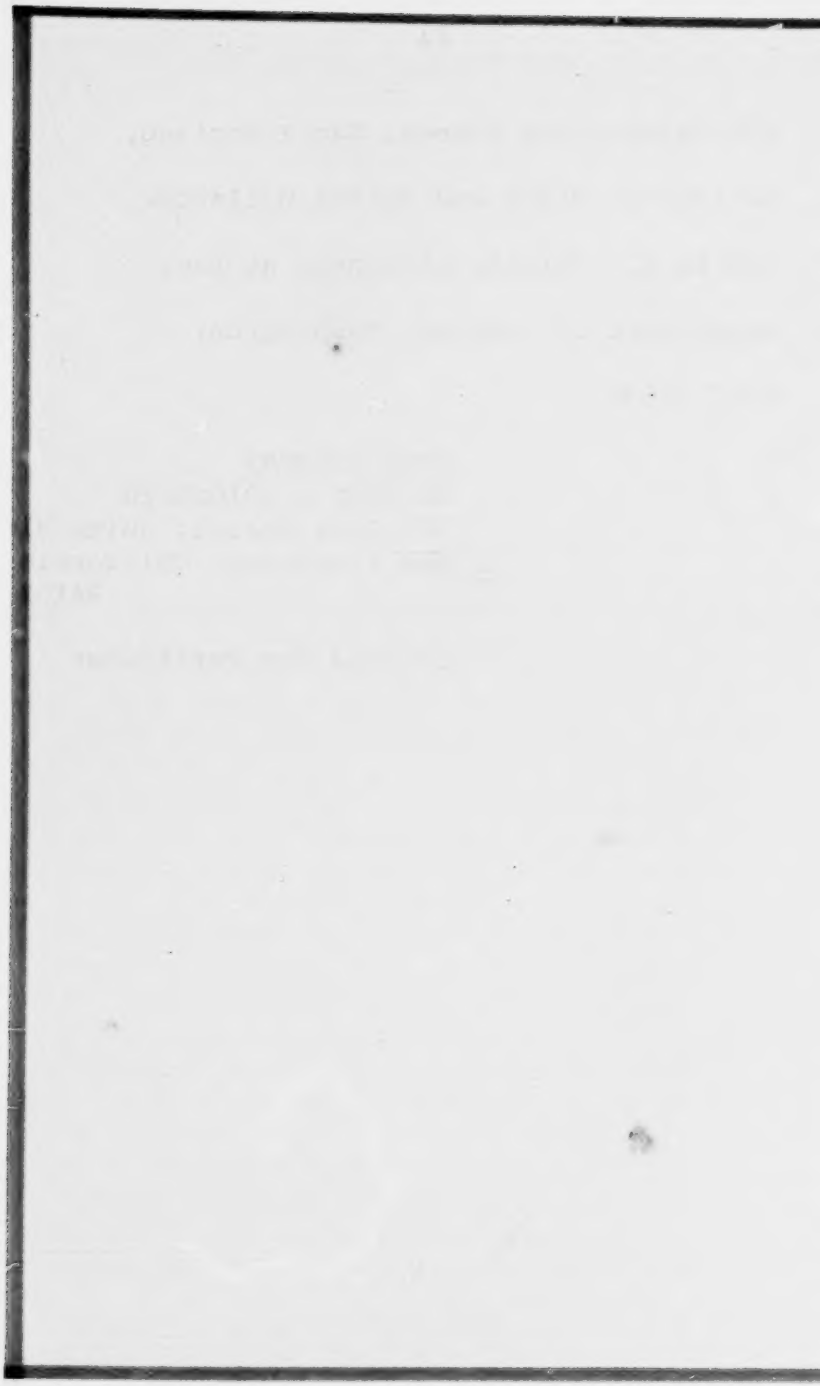

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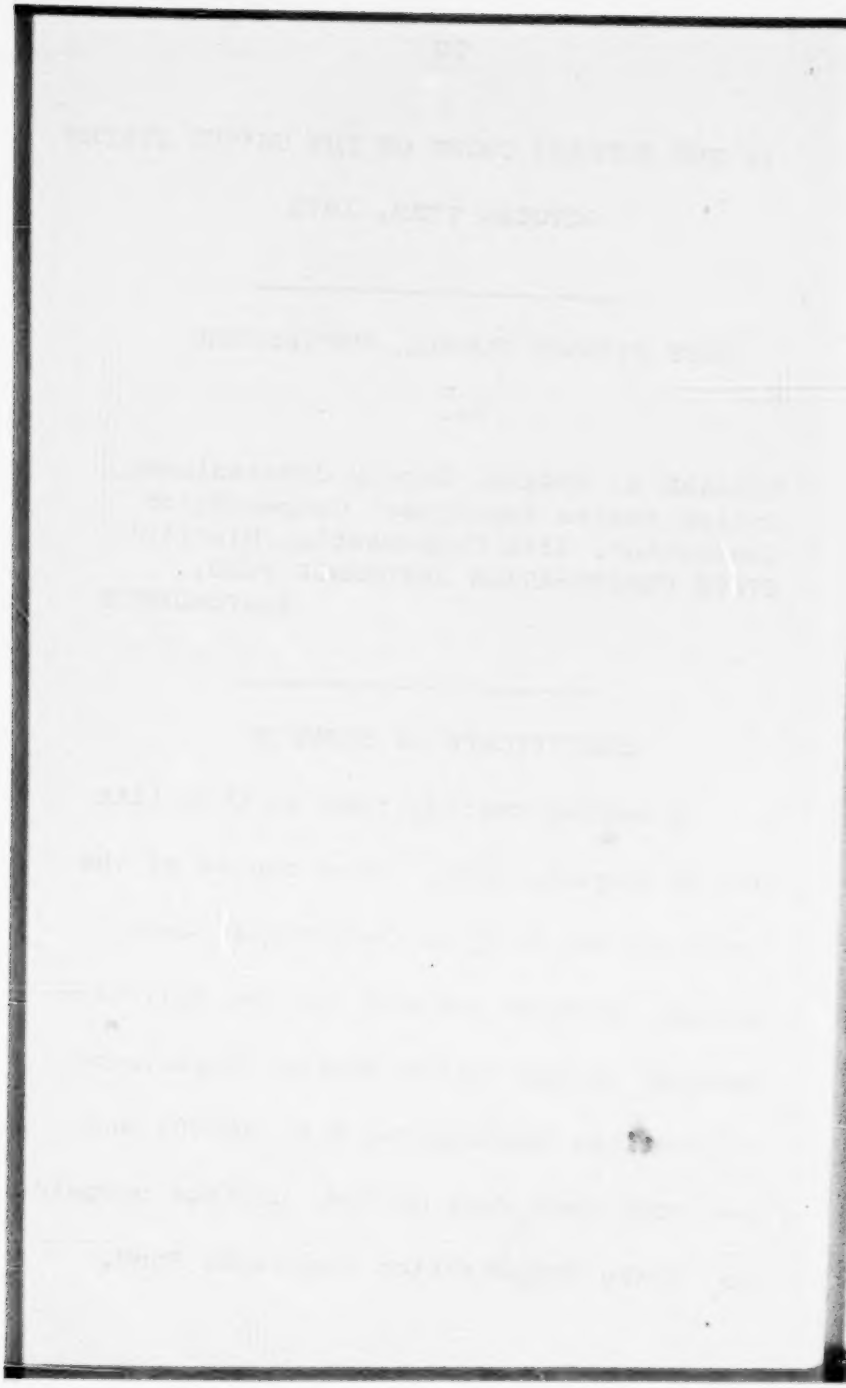
CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 1974, five copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; and one copy each were mailed, postage prepaid, to State Compensation Insurance Fund,

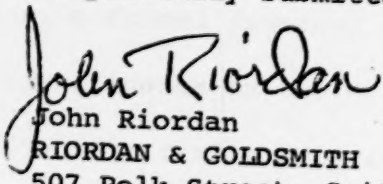


It is respectfully submitted that Petitioner should be found to be entitled to death benefits under the Act under the circumstances and facts of this case.

Dated: August 10, 1974.

San Francisco, California

Respectfully submitted,



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followed the pattern of many persons who do not work (or only on brief occasions) while youngsters are growing up. All support came from the deceased. The relationship was long and stable. Historic and social reasons are present in the instant situation where a formal marriage (and, in fact, a formal divorce) are not of primary significance in the creation or termination of a family relationship. Here, the deceased played the role of father and husband. He was the guardian and protector and the male link between his children and wife and the rest of the community.

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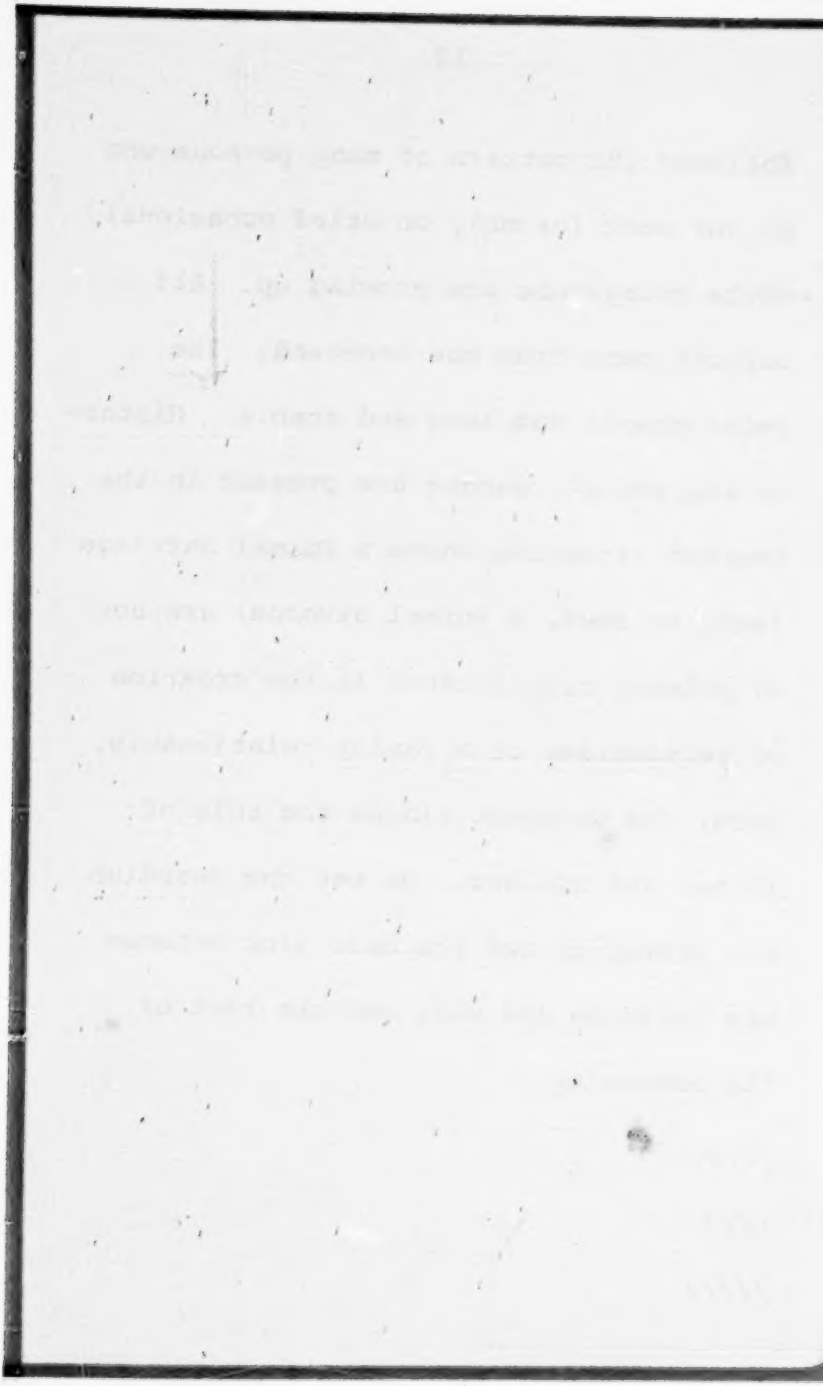
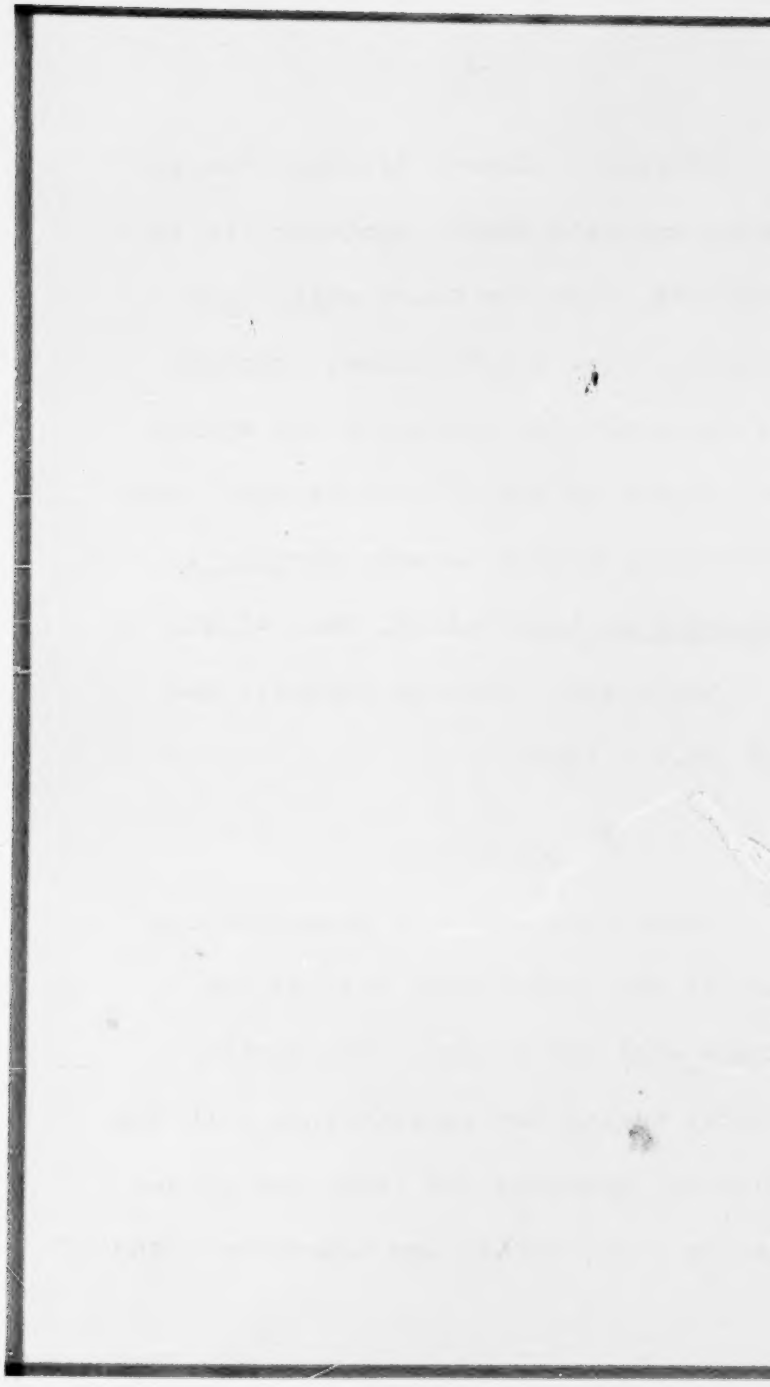


Professor Larson, drawing upon the Hearst and Silk cases, contends, it is submitted, that the Court will, upon occasion, view a traditional concept and definition to implement the spirit and purpose of social legislation. See discussion, Arthur Larson, Workmen's Compensation Law, Vol.IA, Sec. 43.41, pps. 628 - 631, (Matthew Bender), New York, N.Y., 1970.

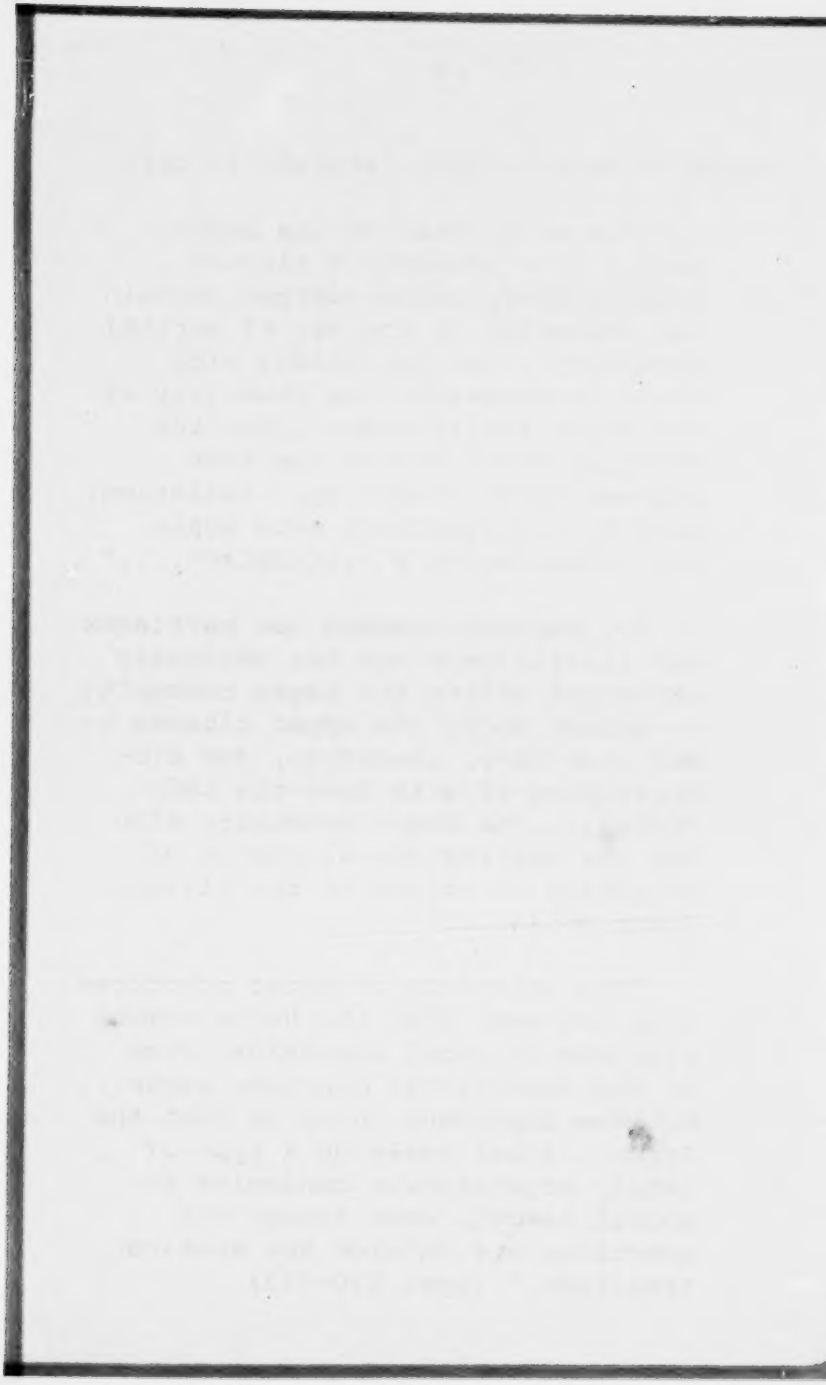
CONCLUSION

Instantly, there is presented the case of the traditional role of the modern wife and mother. She worked briefly during her relationship with the deceased, spending the remainder of her time as wife, mother and homemaker. She



(Harper & Bros.), 1944, states, in part:

> "The uniqueness of the Negro family is a product of slavery... After slavery there emerged certain new obstacles in the way of marital stability...Yet coincident with these developments the stability of the Negro family grew....But the starting point was so low that Negroes never caught up. Isolation, poverty and ignorance were again the obstacles to acculturation...."
>
> "...Further, common law marriages and illegitimacy are not seriously condemned within the Negro community -- except among the upper classes -- and they have, therefore, few disorganizing effects upon the individual....The Negro community also has the healthy social custom of attaching no stigma to the illegitimate child...."
>
> "The existence of these practices does not mean that the Negro community has no moral standards, even in the traditional American sense... but the important thing is that the Negro...(has) built up a type of family organization conducive to social health, even though the practices are outside the American tradition." (pps. 930-935)



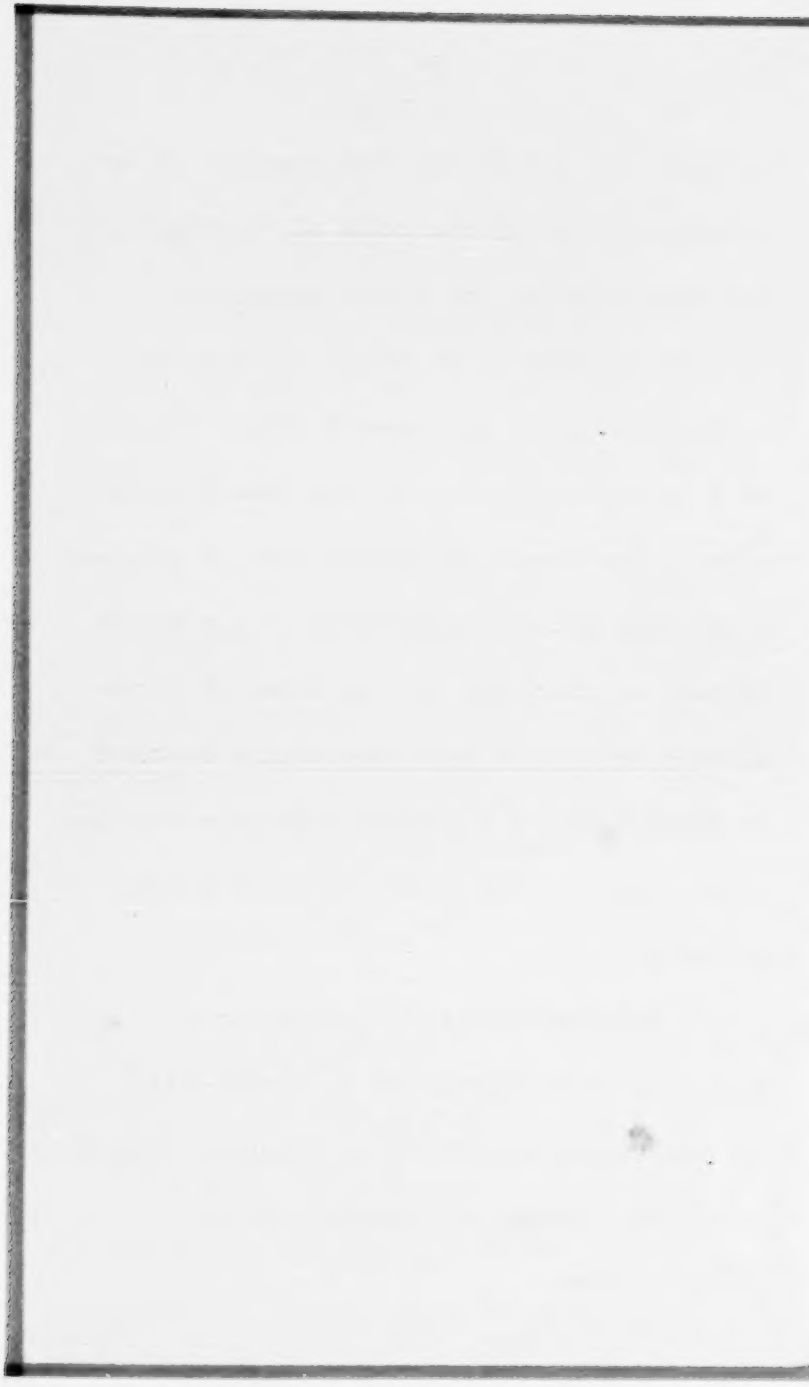
It is submitted that the experience of slavery and post-Civil War discrimination and poverty must be considered in viewing the approach of Blacks to formal ceremonial marriage. It is respectfully submitted that a ceremonial marriage is not as significant a factor in a family relationship as it is with some others. There is not the same "stigma" assigned to a youngster born to a union where there is not a ceremonial marriage in the Black community as in some White communities (See Daniel P. Moynihan, The Negro Family: The Case of National Action, Office of Policy Planning and Research, U.S. Dept. of Labor, March 1965).

Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy,

history and sociology are crucial to an understanding of the role of the family and marriage in the Black community.

To suggest that these factors be considered does not assert there should be a different rule for the Black community. The issue is solely one of whether there was actual dependency -- and one factor to consider is the view of ceremonial marriages and importance thereof in establishing a stable family relationship. Again, the issue is only actual dependency.

Administratively, producing a marriage certificate is of great help in the event conflicting "spouses" claim benefits. That, of course, is not present here.



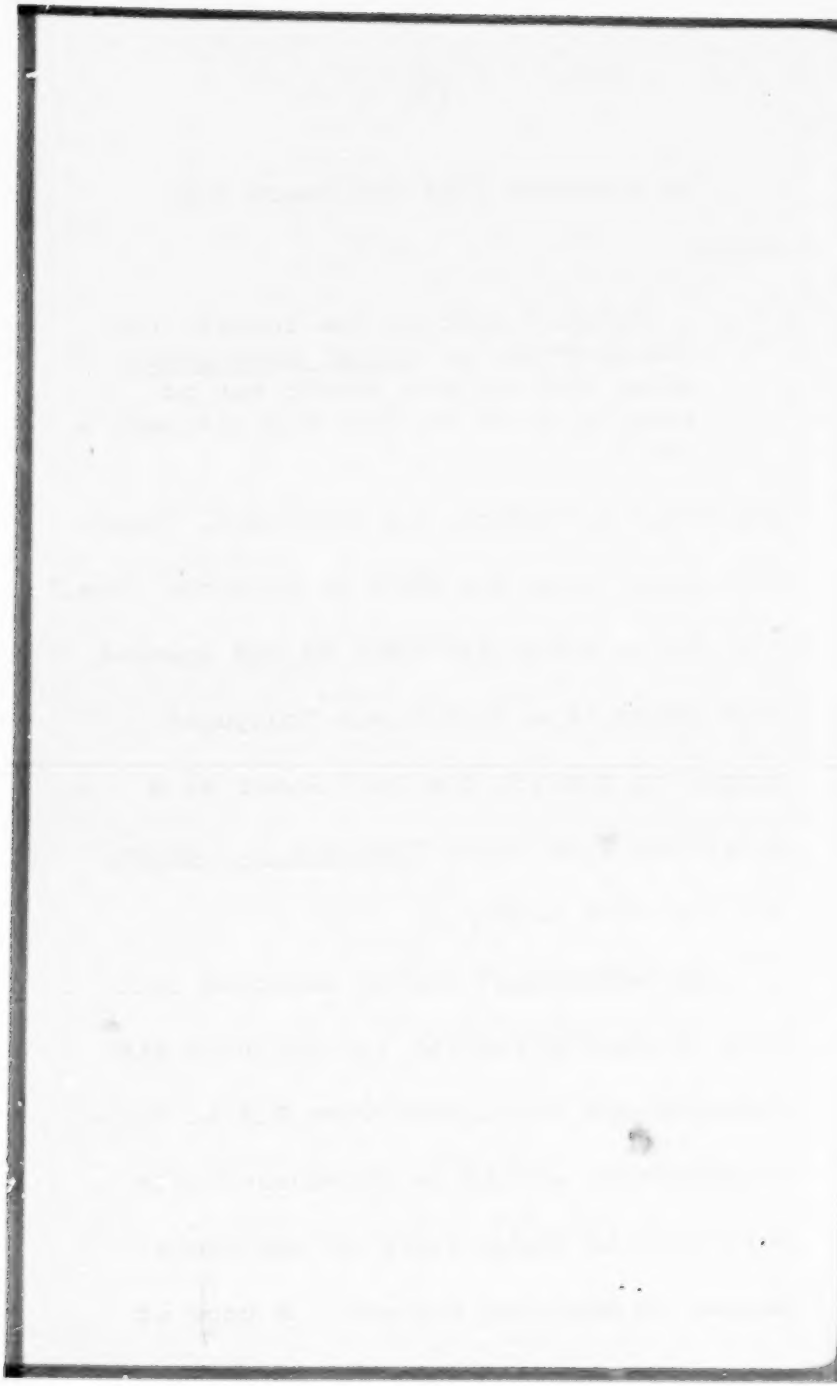
He stresses that the board and court:

> "Should confine the inquiry to the question of actual dependency under the Act and should not go looking under or into the claimant's bed."

Any other procedure, he concluded, "casts this court into the role of Keystone Cops."

It is submitted that in the instant case there is a sufficient "conjugal nexus" to qualify the Petitioner as a surviving wife under Thompson v. Lawson, 347 U.S. 334 (1965).

An additional factor injected into this factual situation is that both the deceased and Petitioner were Black. This circumstance should be considered with reference to the history of the Black person in American society. A page of



> theory that "dependency" has no moral content and that courts may not read into the act moral disqualifications which the legislature has not seen fit to impose. The dissent argued that the general purpose of the Act did not include the "endowment of illicit relationships," and concluded with a ringing phrase worthy of a Jonathan Edwards: "We are not at liberty to ascribe to the legislature an intent to upset fundamentals still recognized by law and society (however often transgressed by individuals), in order to take the children's bread and cast it to the dogs."

In a comparable case, I.N.A. v Jewel, 118 Ga. App. 599, 164 S.E. 2d 846 (1968) Hall, J. stated in his dissent:

> "There is no provision under the Act which states that the claimant forfeits his or her rights under the Act for violating sex laws, alcholic beverage laws, traffic laws, gambling laws, etc." (at p. 850)

but had been divorced. He seems to have proposed marriage, but claimant declined on account of religious scruples. Instead, they set up housekeeping together, and deceased supported claimant and her two minor children for something like ten years. She was generally known in the neighborhood by his name, and the whole arrangement appears to have been as cozy, happy, and respectable as one could wish, except, of course, that one important detail, that of marriage, was missing. Note that there was here no legal impediment to the marriage, no bigamy, and no adultery. In fact, there may have been nothing beyond a housekeeping arrangement, but, since courts are usually supposed to believe the worst in situations of this kind, the case was handled on the assumption of the existence of an immoral relationship. The Maryland statute had been amended in 1947 to remove not only the conclusive presumption of dependency for widows and children but also the limitation of dependents to named classes; the new statute merely said that all questions of dependency shall be determined in accordance with the facts. Applying this statute, the court reversed the Commission's denial of benefits, on the simple

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vs.

WILLIAM K. ROGERS, Deputy Commissioner, United States Employees' Compensation Commission, 13th Compensation District,
Appellee.

STATE COMPENSATION INSURANCE FUND,
Real Party in Interest-Appellee.

No. 72-2884

OPINION

[May 16, 1974]

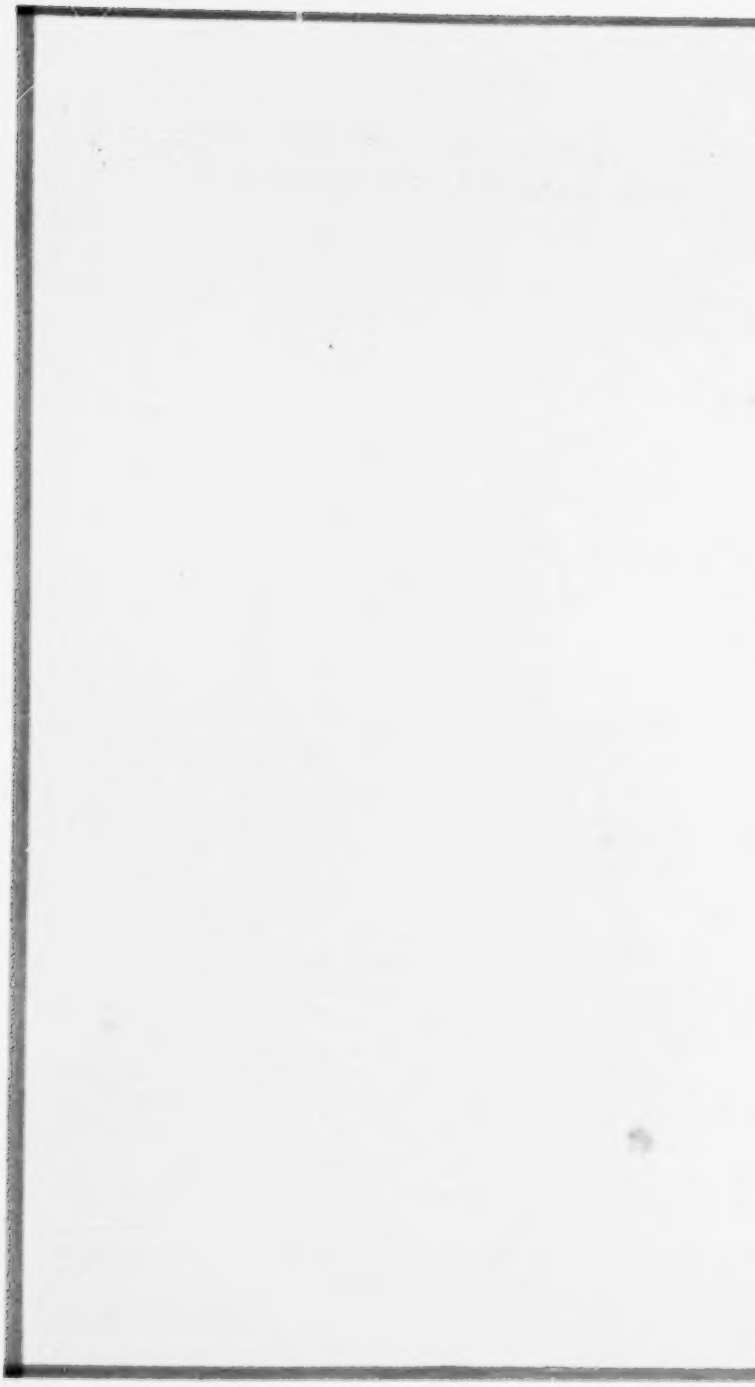
Appeal from the United States District Court
for the Northern District of California

Before: ELY and SNEED, Circuit Judges, and WILLIAMS,* District Judge.

SNEED, Circuit Judge:

The appellant, Ms. Mary Stewart Powell, brought this action pursuant to Section 21 of the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.*, before the Compensation Commission for the 13th Compensation District, which denied the appellant's claim for death benefits under the above Act as the "surviving wife" or "widow" of Mr. Amadee B. Powell. In the district court the Deputy Commissioner and the State Compensation Insurance Fund, the real party in interest, moved for summary judgment dismissing the appellant's action. A motion for summary judgment setting aside the Deputy Commissioner's

*Honorable David W. Williams, United States District Judge, Central District of California, sitting by designation.



order and finding that the appellant was entitled to judgment on her claim as a matter of law was also filed. The appellant's motion was denied and that of the Deputy Commissioner and the State Insurance Board was granted. This appeal resulted. Our jurisdiction rests on 28 U.S.C. §1291, while that of the district court flows from 33 U.S.C. §901.

In large part because of the appellant's commendable candor, there is no dispute about the facts. She and the decedent, Mr. Amadee B. Powell, lived together from 1955 until his death in 1969 but did not undergo a formal or ceremonial marriage. Three children were born of this union, and the entire household was supported by the decedent. During most of this period the decedent was lawfully married to another, a marriage of which the appellant was aware. This marriage was dissolved by divorce in 1965, but there occurred no ceremonial marriage by the Powells thereafter. In the words of the appellant, her marriage was legal "[I]n the sight of God, yes; but in the sight of man, no."

The Deputy Commissioner found that the Powells lived together as man and wife in the States of California and Nevada, that death benefits should be paid on behalf of the three minor children to the appellant, their mother and natural guardian, but that no death benefits were payable to the appellant as a "surviving wife" or "widow". 33 U.S.C. §901(16), §909.

There is no escape from the conclusion that under these facts appellant was neither the lawful nor putative wife of the decedent under California or Nevada law. Lawful marriage requires the "issuance of a license and solemnization." Section 4100, California Civil Code. To be a putative spouse one must believe in good faith that he is a party to a valid marriage. *Vallera v. Vallera*, 21 Cal. 2d 681, 134 P.2d 761 (1943); *Miller v. Johnson*, 214 Cal. App. 123, 29 Cal. Rptr. 251 (1963); *Union Bank & Trust Co. v. Gordon*, 116 Cal. App. 2d 681, 254 P.2d 644 (1953); *In re Jackson's Estate*, 112 Cal. App. 2d 16, 245 P.2d 684 (1952). The appellant had no such belief. Her status was that of a common law wife under circumstances in which neither state with which the Powells had relevant contacts recognize a common law marriage. Sections 4100, 4213, California Civil Code; Section 122.010, Nevada Revised Statutes, Vol. IV. The issue before us is whether Ms. Mary Stewart Powell under these circumstances can be con-

sidered a "surviving wife" or "widow" under the Longshoreman's Harbor Workers' Compensation Act. We hold that she can not.

This Circuit has recognized, as it must, that the meaning of Sections 901(16) and 909 of the Act is a question of federal law. *Albina Engine and Machine Works v. O'Leary*, 328 F.2d 877 (9th Cir., 1964). However, this Circuit also has recognized that in the absence of a statutory definition of "surviving wife" or "widow" the applicable local law supplies the meaning of these terms. *Albina Engine and Machine Works v. O'Leary, supra; Bolin v. Marshall*, 76 F.2d 668 (9th Cir., 1935).

California law, while not recognizing the common law marriage, does employ the putative spouse doctrine generously. Thus, a putative wife is entitled to California workmen's compensation death benefits. *Neureither v. Workmen's Comp. App. Bd.*, 15 Cal. App. 3d 429, 93 Cal. Rptr. 162 (1971); *Brennfleck v. Workmen's Comp. App. Bd.*, 265 Cal. App. 2d 738, 71 Cal. Rptr. 525 (1968). Quite properly, the putative spouse doctrine has been employed to permit such a spouse to qualify as a "surviving wife" under the Act here before us. *Holland America Insurance Co. v. Rogers*, 313 F.Supp. 314 (D.C.N.D. Calif. 1970). However, no case in California or Nevada has been found in which a common law wife has been extended the protection of the applicable workmen's compensation act, unless the common law marriage was validly created in a state which recognizes such marriages. *Tatum v. Tatum*, 241 F.2d 401 (9th Cir., 1957).

California also recognizes that the putative spouse is entitled to take by intestacy on the death of his spouse in the same manner as a validly married spouse. *In re Krone's Estate*, 83 Cal. App. 2d 766, 189 P.2d 741 (1952); *Massenga v. Rosso*, 87 Cal. App. 2d 790, 197 P.2d 770 (1948). *In re Krone's Estate* has been used to allow a putative wife to bring an action for the wrongful death of her putative husband. *Kunakoff v. Woods*, 166 Cal. App. 2d 59, 332 P.2d 773 (1958). An agreement to pool earnings entered into by a putative spouse with the other member of the union has also been accorded the same protection that it would have received had there been a valid marriage. *Sancha v. Arnold*, 114 Cal. Rptr. 2d 772, 251 P.2d (1952).

In view of the failure of California and Nevada to recognize the common law marriage, and California's liberality in extend-

ing the equivalent of marital rights to a putative spouse, we are reluctant to depart from our practice of looking to the proper local law to provide the content of the terms "surviving wife" and "widow". To construe these terms to embrace the common law spouse to some extent would impose upon the residents of California and Nevada a form of marriage which they rejected in favor of, at least in the case of California, the putative spouse doctrine. It is in this manner that the necessary melioration of the requirements of a valid marriage is accomplished.[1]

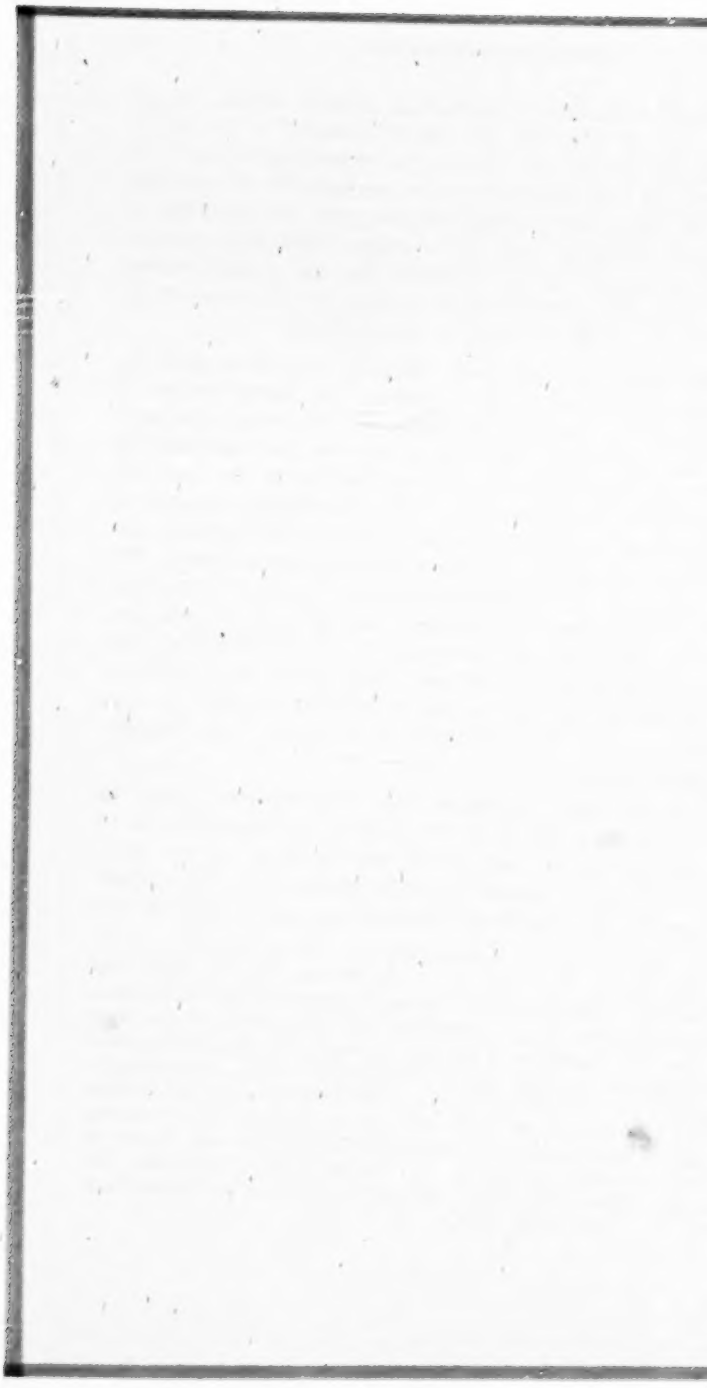
It is urged upon us that both changing life styles and the cultural history of Blacks make necessary an interpretation of the Act that would recognize the rights of a surviving spouse of a common law marriage. This federal common law marriage, so to speak, would make uniform the application of the Act and eliminate from its administration the adventitious element of whether the law of a particular state recognized the common law marriage. These arguments are not without a certain appeal. We think, however, they more properly should be directed to Congress. Our view is strengthened by the fact that reliance on local law to supply the meaning of "surviving wife" and "widow" has existed since passage of the Act and Congress has not chosed to intervene. Whatever may be our desire to reform the law, it must be subordinate to our duty faithfully to interpret it in a reasonably consistent manner.

Finally, it has been suggested that the Supreme Court in *Thompson v. Lawson*, 347 U.S. 334 (1954) has instructed us to interpret the Act in the manner we are rejecting. In our view *Thompson v. Lawson* teaches no such lesson. The Court there was confronted with a claimant, deserted but not divorced by the

---

[1]In re Marriage of Cary, 34 Cal. App. 3d 345, 109 Cal. Reptr. 862 (1973) holds that property acquired during "an actual family relationship, with cohabitation and mutual recognition and assumption of the usual rights, duties, and obligations attending marriage", in which both parties were aware that the marriage was not valid, is to be divided equally pursuant to §4800, Cal. Civ. Code. We are not prepared to accept this decision standing alone as recognition of the common law marriage by California.

For a general discussion of the status of California law with respect to the rights of a meretricious spouse, *see* Pinnolis, Illicit Cohabitation: The Impact of the Vallera and Keene Cases on the Rights of the Meretricious Spouse, 6 *U.C.D. L.Rev.* 354 (1973).



decedent, who had not lived with the decedent for 26 years prior to his death and who had "married" and "divorced" another during the intervening period. The issue was whether the claimant was a "widow" within the meaning of the Act, which is defined to include "only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart from justifiable cause or by reason of his desertion at such time," 33 U.S.C. §902(16). The Court resolved the issue against the claimant. She was neither living with, nor dependent for support upon, the decedent. Furthermore, she was not living apart "for justifiable cause or by reason of his desertion at such time." Her purported remarriage severed the "conjugal nexus" which the Act requires as the basis of her claim. 347 U.S. at 337. A deserted wife remains a deserted wife for the purposes of the Act only so long as she preserves the "conjugal nexus."

This holding can not be construed to mean that a common law marriage, as defined by federal law, is a "conjugal nexus" and that it alone is sufficient to qualify the claimant as a "surviving wife" or "widow". Such a meaning excessively extends the relatively narrow holding of the Supreme Court which, as a matter of fact, was designed to reject a holding of this Court which indicated that a claimant who was once a deserted wife remained one for the purposes of the Act although she had "remarried" another. 347 U.S. at 335. *See Moore Dry Dock Co. v. Pillsbury*, 169 F.2d 988 (9th Cir., 1948). It is for others to determine whether such an extension is desirable.

AFFIRMED.

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FILED

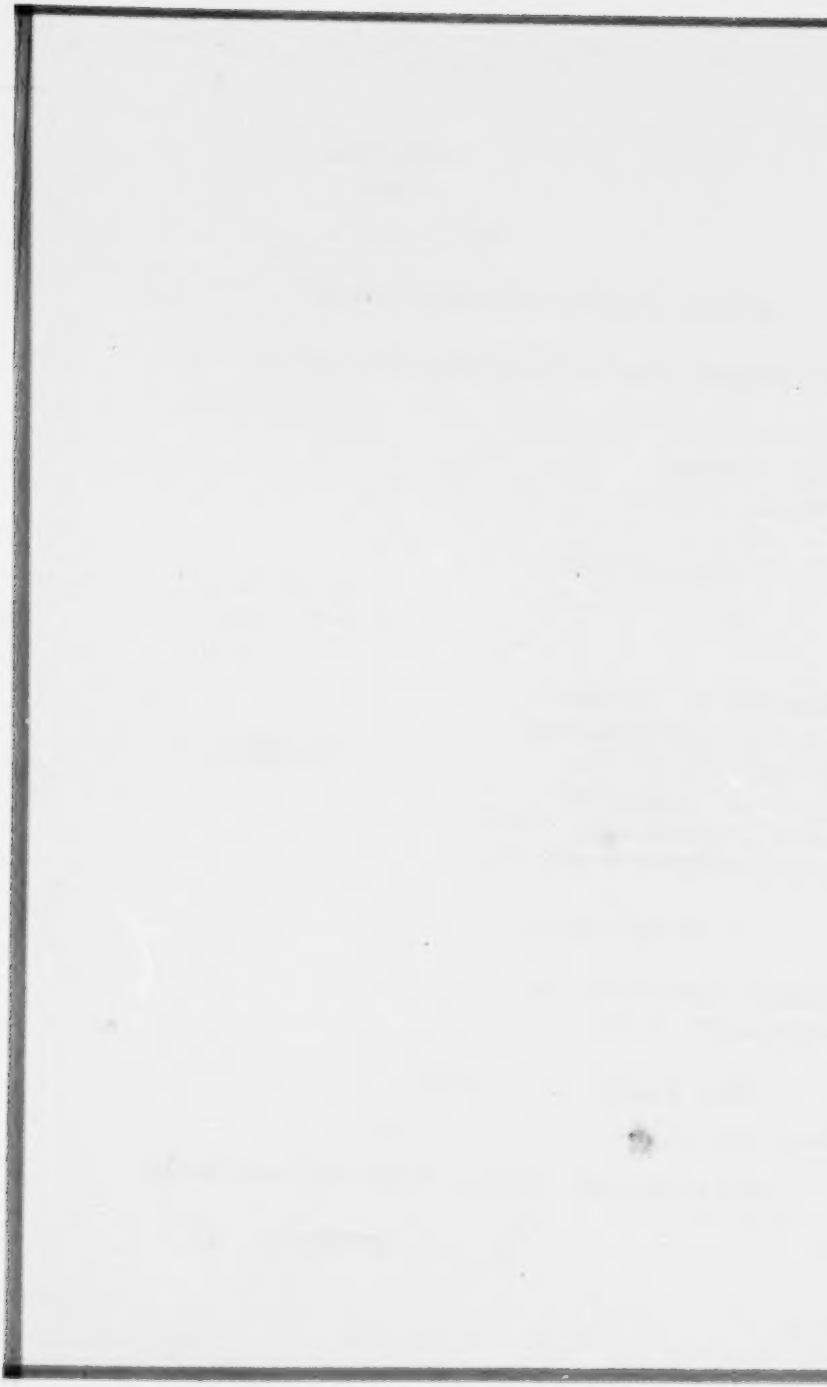
AUG 24 1972

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARY STEWART POWELL, Widow, Petitioner, v. WILLIAM K. ROGERS, Deputy Commissioner, United States Employees' Compensation Commission, 13th Compensation District, Respondent, STATE COMPENSATION INSURANCE FUND, Real Party in Interest.	)	CIVIL NO. C-71-358-SAW JUDGMENT

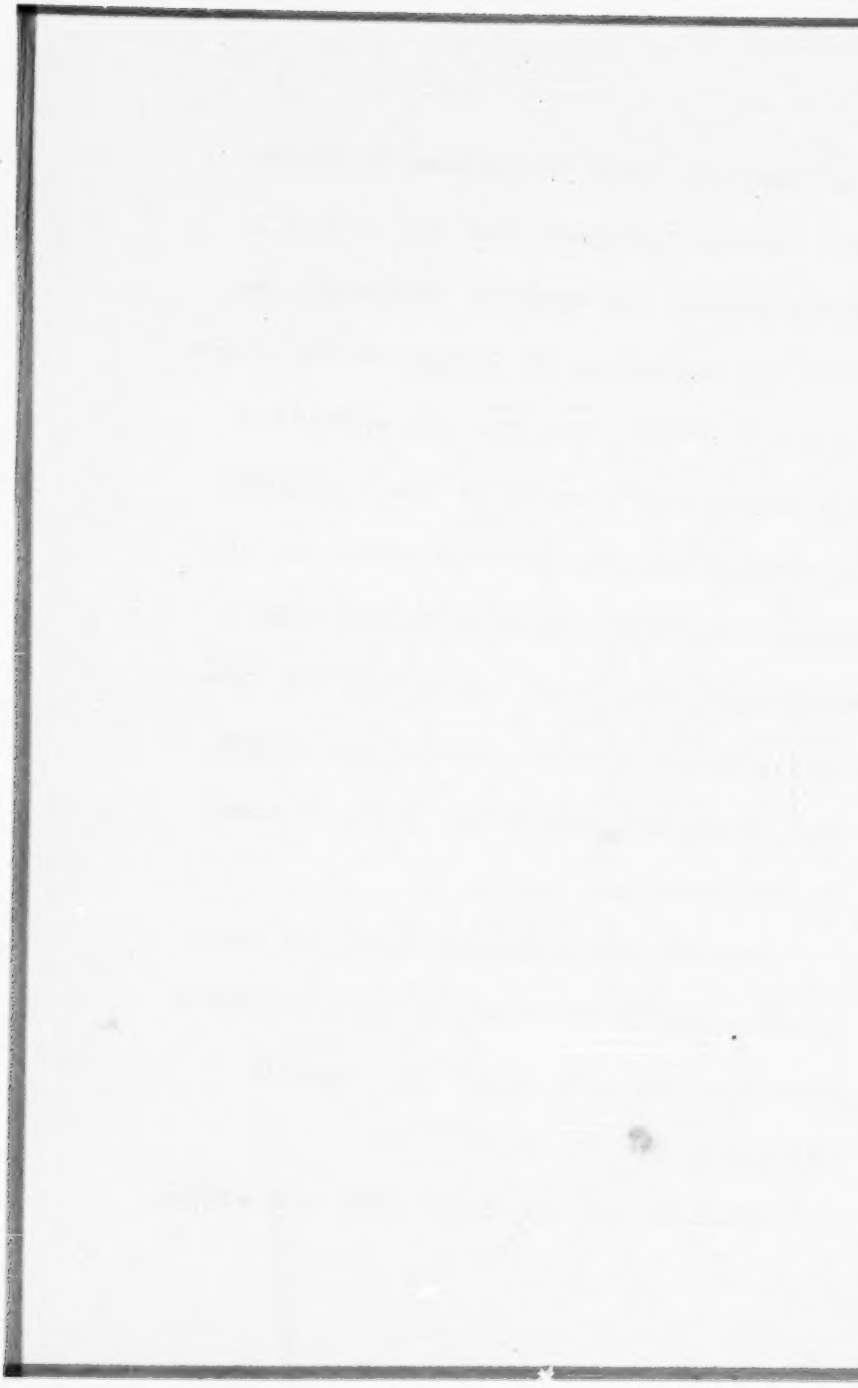
This matter having come on regularly



for hearing, upon Petitioner's motion for summary judgment and Respondent's cross motion for summary judgment, before the undersigned Judge of the above entitled court, the parties appearing and being represented by their counsel of record herein, and the court having duly considered the briefs and other memoranda submitted, including the administrative record, and having heard oral argument, and being fully advised in the premises, it is

ORDERED and ADJUDGED that the decision of the Respondent is in accordance with the law and is in all respects affirmed, and it is further

ORDERED and ADJUDGED that the action



is hereby dismissed on the merits.

DATED:

UNITED STATES DISTRICT JUDGE

Presented by:

JAMES L. BROWNING, JR.
United States Attorney

JOHN F. MEADOWS
Attorney in Charge,
West Coast Office
Admiralty and Shipping Section

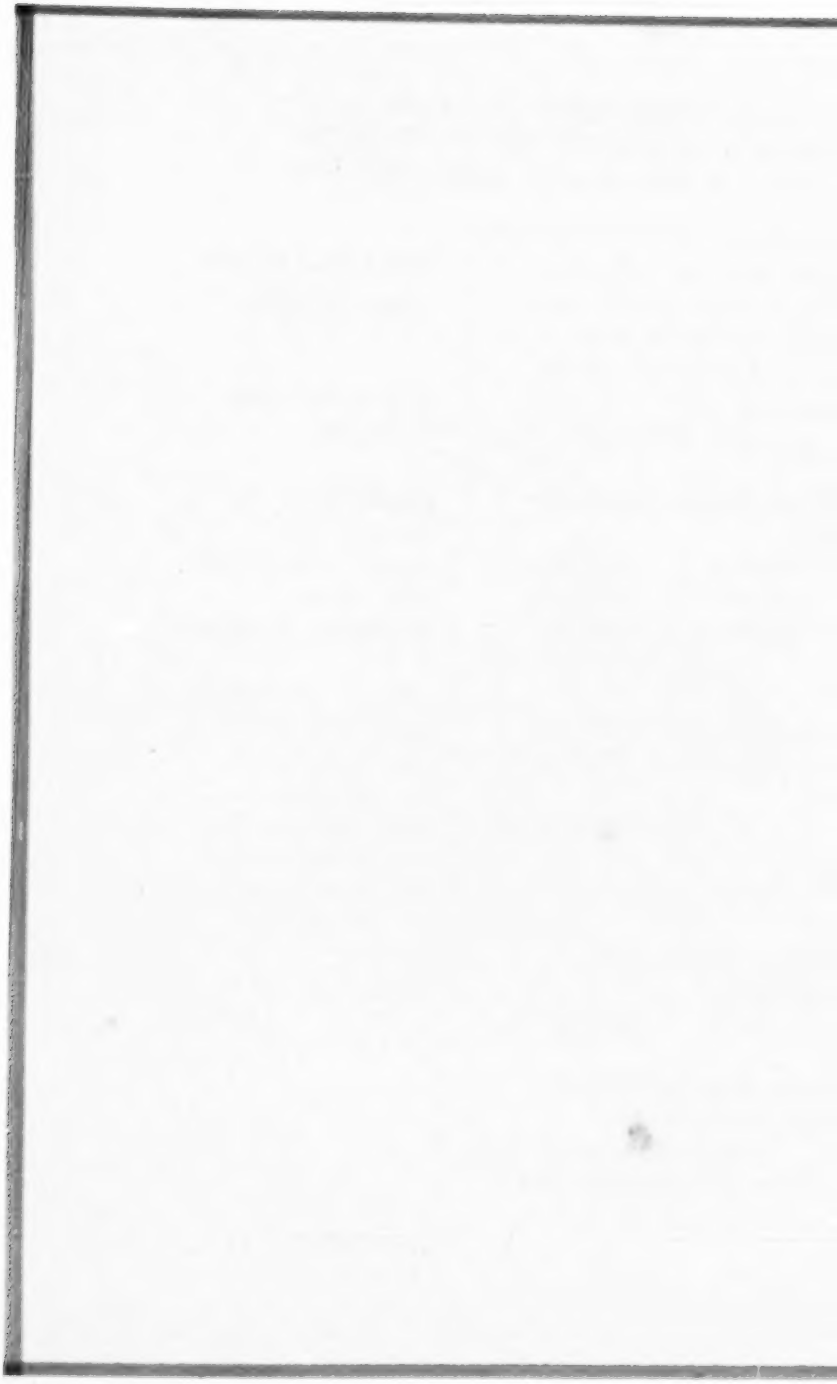
/s/ Robert J. Finan
ROBERT J. FINAN, Attorney
Admiralty and Shipping Section
U.S. Department of Justice

Attorneys for Respondent
William K. Rogers

U.S. DEPARTMENT OF LABOR
WORKPLACE STANDARDS ADMINISTRATION
Bureau of Employees' Compensation

In the matter of the proceedings under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901-50).	ORIGINAL FILED JAN 27 1971
MARY STEWART POWELL, Widow, and RODNEY D. POWELL, CEDRIC J. POWELL, TERRY D. POWELL, Minor Children of AMADEE B. POWELL, Deceased Employee, Claimants, - Versus - MARINE COOKS AND STEWARDS, Employer, STATE COMPENSATION INSURANCE FUND, Insurance Carrier.	COMPENSATION ORDER REJECTION OF CLAIM FOR DEATH BENEFITS FOR MARY STEWART POWELL AWARD OF DEATH BENEFITS FOR (1) Rodney D. Powell (2) Cedric J. Powell, (3) Terry D. Powell CASE NO. 13-14638

APPENDIX III



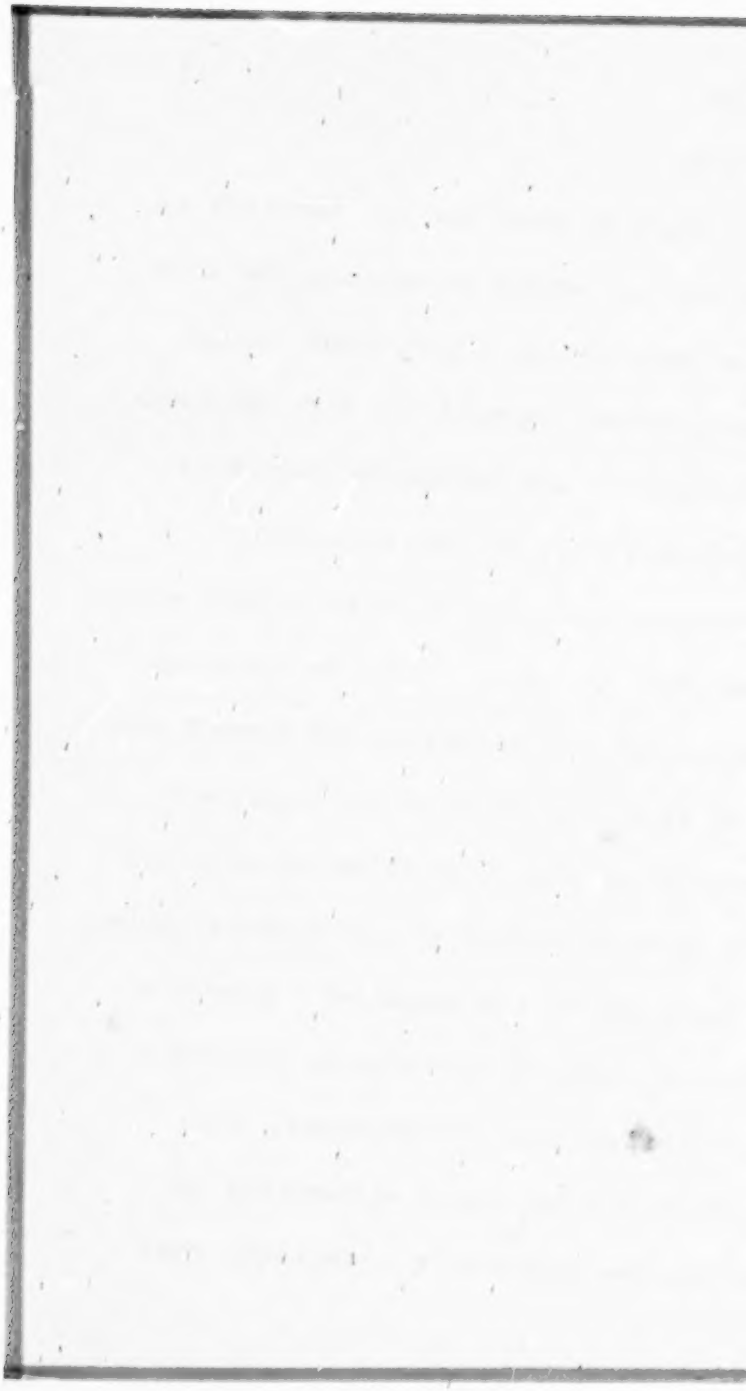
Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. That on the 23rd day of October 1969, the deceased employee above-named was in the employ of the employer above-named at San Francisco, in the State of California, in the Thirteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under the said Act was insured by the State Compensation Insur-

ance Fund;

2. That on said day the deceased employee herein, while performing services for the employer as a patrolman (union representative), aboard the S.S. Mariposa then afloat on the navigable waters of the United States at San Francisco, California, sustained a fatal injury when he was shot to death; that the deceased employee and his assailant had become involved in a dispute when the assailant attempted to form a maritime union which might have attracted as its members those who belonged to the deceased employee's employer; that in the dispute between the assailant and the decedent, such decedent was basically attempting to protect the employer's interests; that

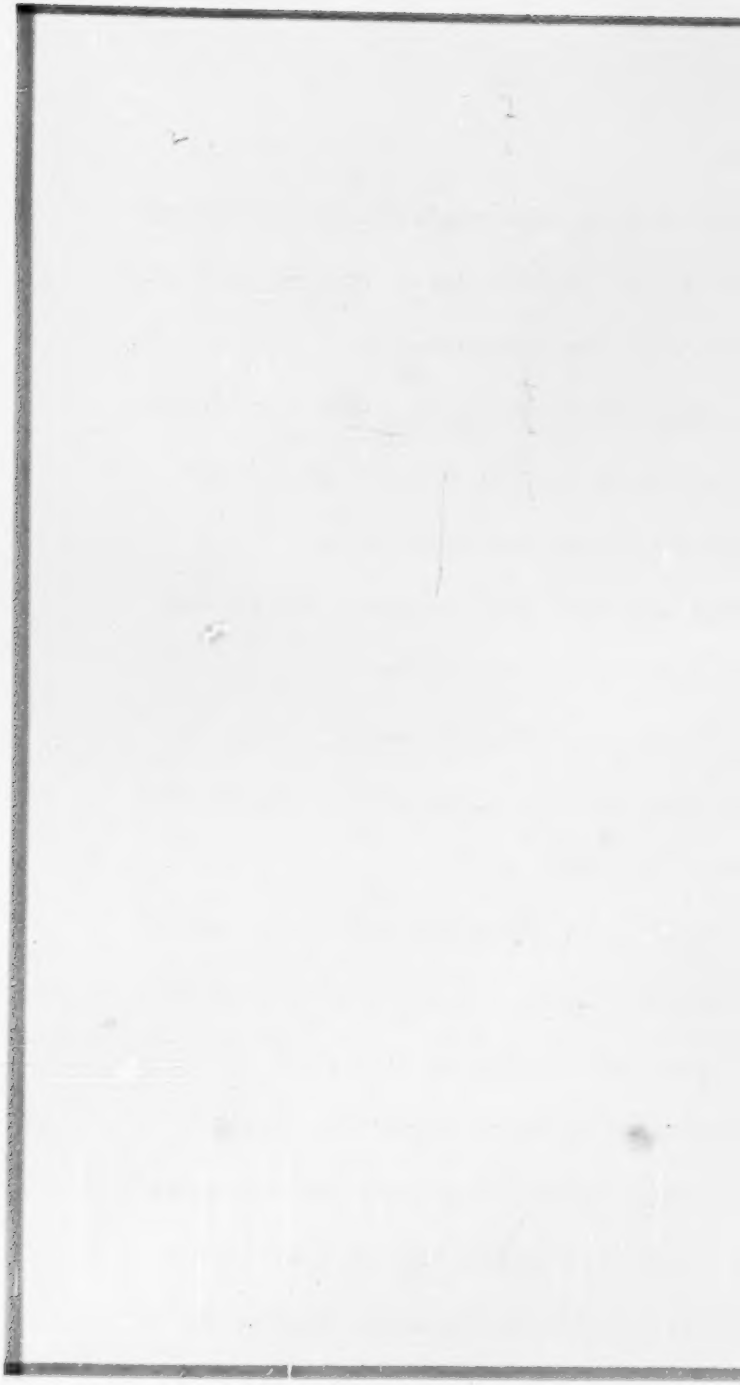


the fatal injury was employment connected; that the fatal injury arose out of and in the course of the employment;

3. That written notice was not given to the employer within thirty days, but that the employer had knowledge of the death and has not been prejudiced by the lack of such written notice;

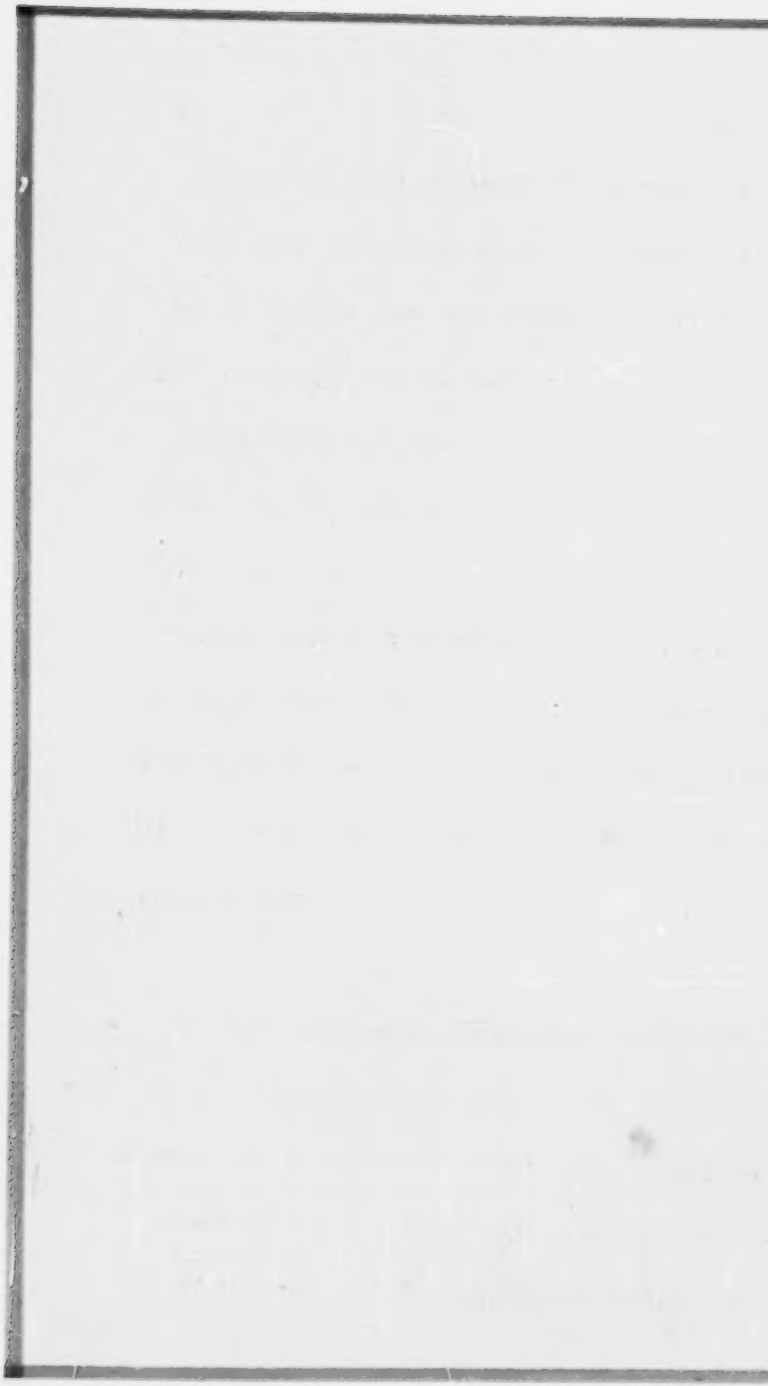
4. That the average weekly wage of the employee at the time of his death was in excess of $105;

5. That the deceased employee and Mary Stewart Powell began living together in the same household in the year 1955, and continued to live together in such relationship to the time of the employee's death; that from their union there were born three children



Powell, Cedric J. Powell, and Terry D. Powell; that the said employee and Mary Stewart Powell lived as man and wife in the states of California and Nevada; that the said parties were not ceremonially married; that during the period the said parties lived as man and wife, the states of California and Nevada did not recognize a common law marriage; that Mary Stewart Powell was not the surviving wife or widow of the deceased employee within the meaning of such terms as they appear in the said Act;

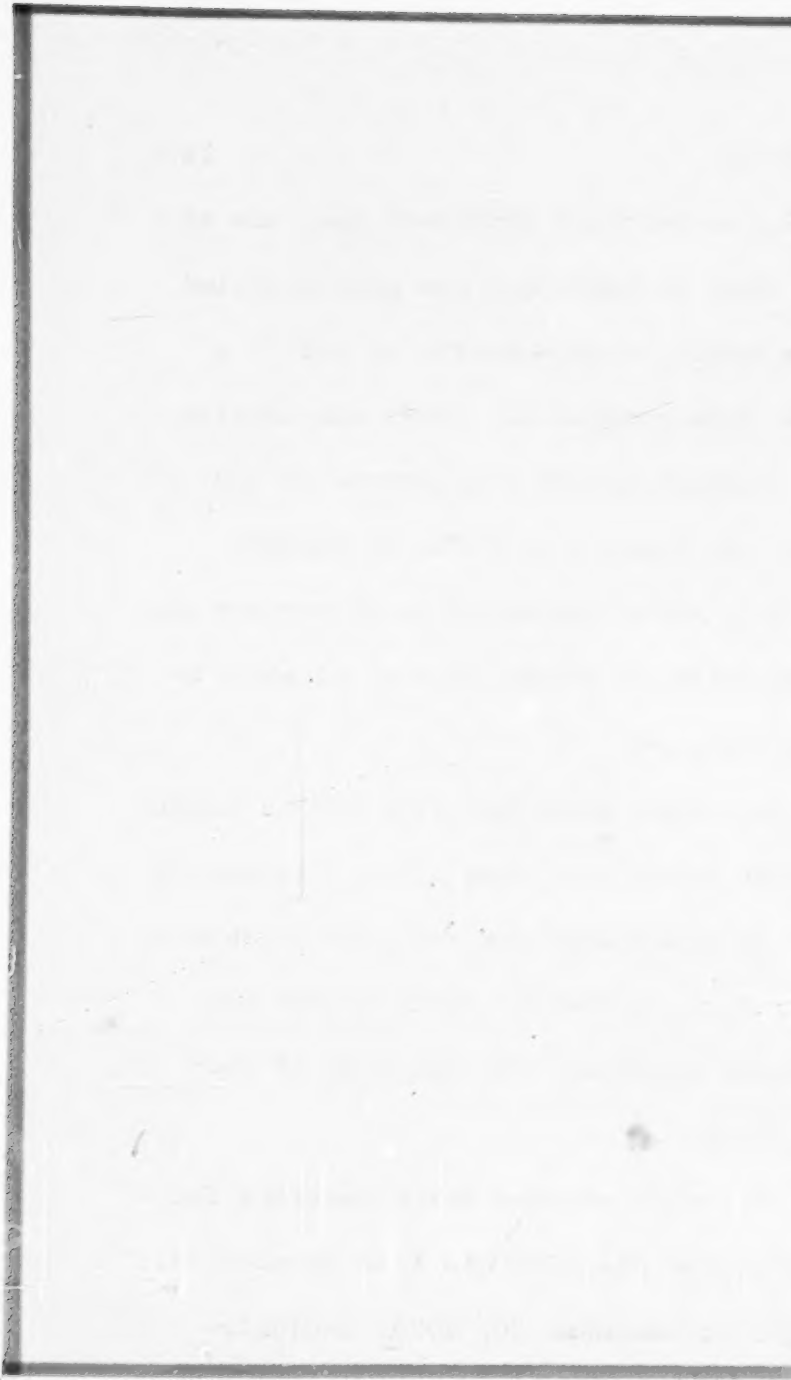
6. That Rodney D. Powell, born on August 11, 1956, Cedric J. Powell, born on December 18, 1958, and Terry D. Powell, born on January 19, 1962, are the surviving minor children of the deceased



employee and were dependent upon him at the time of death and are each entitled to a weekly death benefit of $22.75 a week from October 24, 1969, and continuing subject to the limitations of the Act, (65 percent of $105; 35 percent for one child increased by 15 percent for each child in excess of one) payable in equal shares;

7. That death benefits due in behalf of the three surviving minor children of the deceased employee shall be payable to Mary Stewart Powell, their mother and natural guardian, as custodian of such children;

8. That accrued death benefits for each minor child herein from October 24, 1969, to December 30, 1970, inclusive



(date of last hearing), 61-6/7 weeks at $22.75 a week amount to $1,407.25; that accrued death benefits payable in behalf of the three minor children at the combined rate of $68.25 a week, covering the aforesaid period (61-6/7 weeks) amount to $4,221.75;

9. That the employer and insurance carrier have paid the statutory limitation of $400 as reasonable funeral expenses;

10. That the employer and insurance carrier have voluntarily paid death benefits in the combined amount of $1,638 in behalf of the three minor children herein.

Upon the foregoing findings of fact it is ORDERED that the claim for death

benefits filed by Mary Stewart Powell on behalf of herself be and it is hereby REJECTED for the following reason:

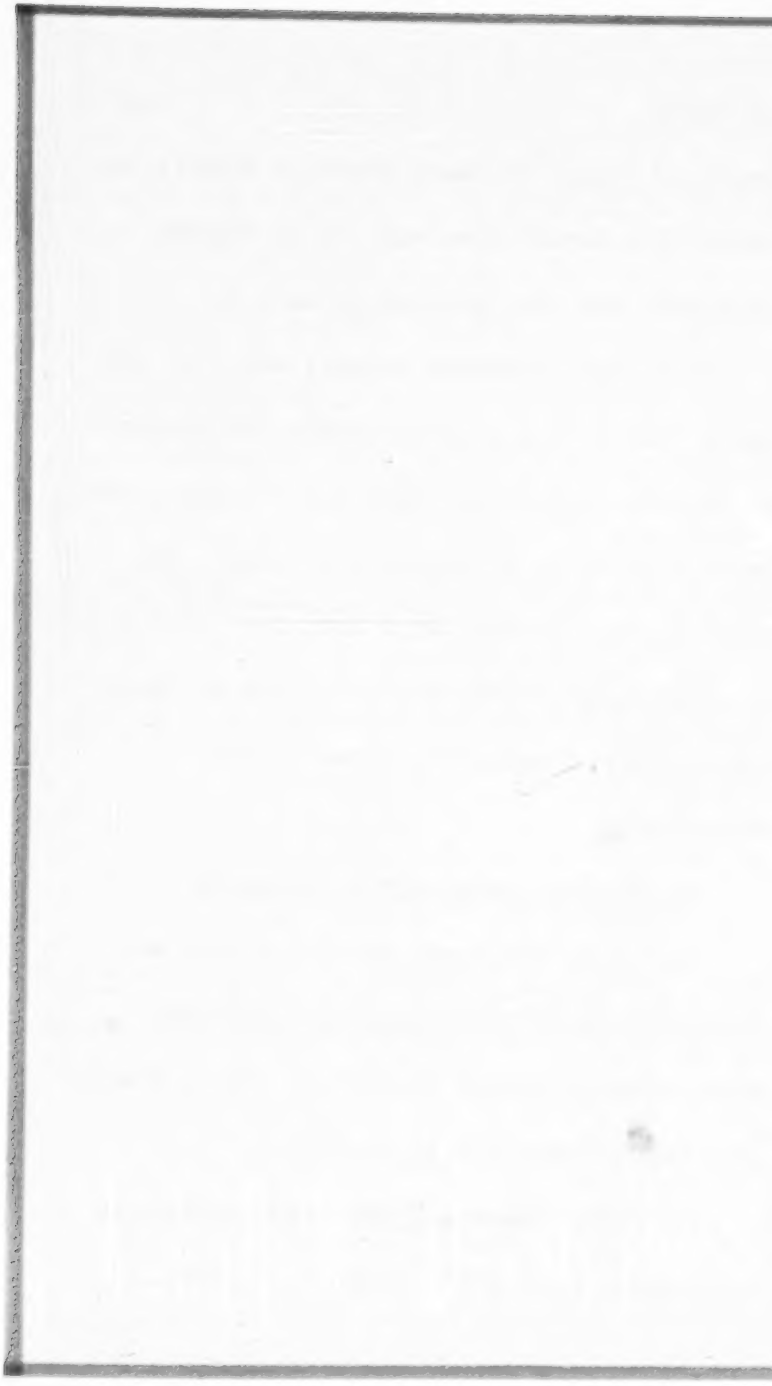
That Mary Stewart Powell was not the legal surviving wife or widow of Amadee B. Powell within the meaning of the terms, surviving wife or surviving widow, as they appear in the said Act.

Upon the foregoing findings of fact the Deputy Commissioner makes the following:

AWARD FOR THREE MINOR CHILDREN

That the employer Marine Cooks and Stewards, and the insurance carrier, State Compensation Insurance Fund, shall pay death benefits as follows:

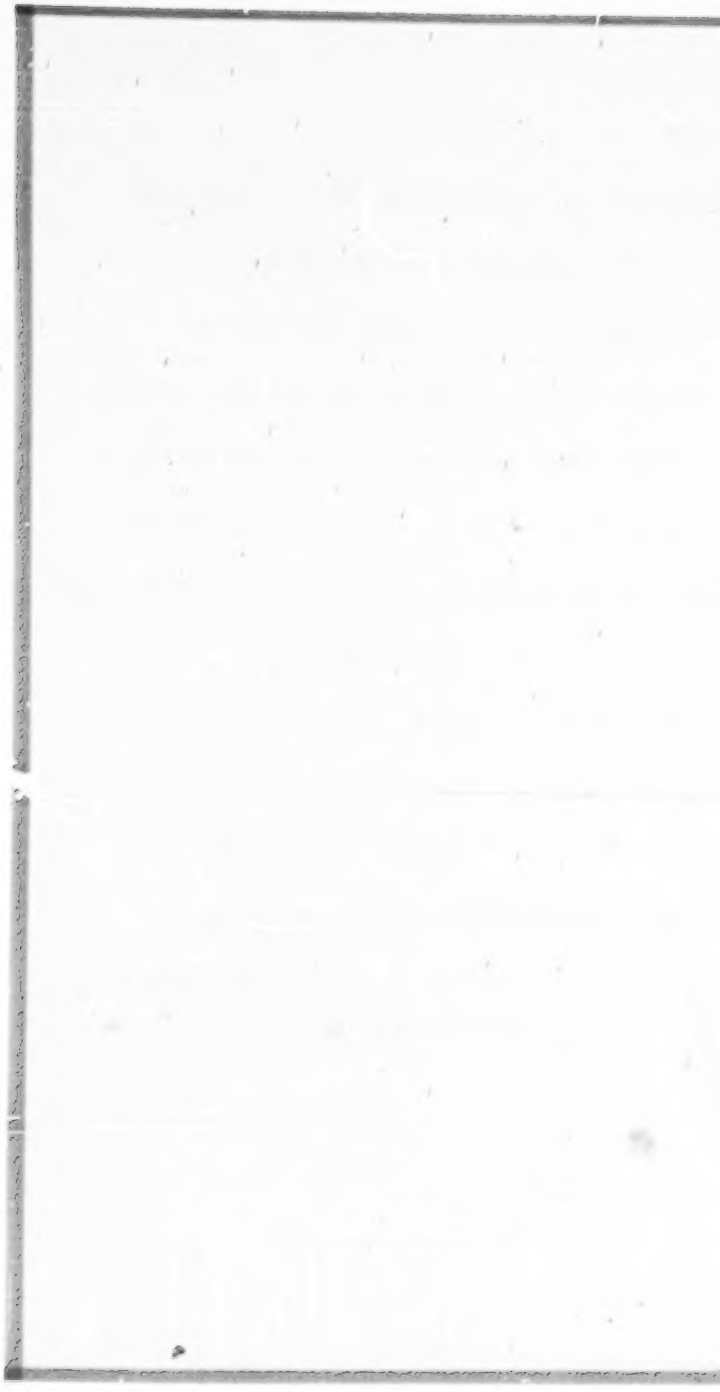
To Mary Stewart Powell as custodian of Rodney D. Powell, Cedriv J. Powell,



and Terry D.Powell, 61-6/7 weeks at the combined rate of $68.25 a week for the three minors, in the amount of $4,221.75, covering the period from October 24, 1969, to December 30, 1970, inclusive; the employer and insurance carrier having already paid $1,638 as death benefits, there is due the sum of $2,583.75, which is to be paid forthwith, together with interest payable in accordance with Section 14(b) and (m) of the Act, 33 U.S.C. 914 (b) and (m) on each past due instalment of compensation at the rate of 6 percent per annum from its original due date until paid. Payments at the combined rate of $68.25 a week are to continue from December 31, 1970, in biweekly instalments subject to the

limitations of the Act or until further order of the Deputy Commissioner.

If payment is not made within 10 days of the dates specified in this order, additional compensation for delay shall be paid at the rate of 20 percent in accordance with Section 14(f) of the Act, 33 U.S.C. 914(f). If default in payment continues over 30 days, application should be made to the Deputy Commissioner within one year after such default for a supplementary order for enforcement of this award by the federal court



in accordance with Section 18(a) of the Act, 33 U.S.C. 918(a).

Given under my hand and filed at San Francisco, California, this 27th day of January, 1971.

/s/ William K. Rogers

WILLIAM K. ROGERS
Deputy Commissioner
13th Compensation District

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-115

MARY STEWART POWELL, PETITIONER

v.

WILLIAM K. ROGERS, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT WILLIAM K. ROGERS IN OPPOSITION

The issue presented is whether in a state which does not recognize common law marriage a woman, who had lived with a man knowing that they were not legally married, is entitled to widow's benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*

1. Petitioner lived with Amadee Powell from 1955 until 1969, when Mr. Powell was fatally shot during the course of his employment (Pet. App. I, p. 2). At the time the couple began living together Mr. Powell was married to another woman. Although he divorced his wife in 1965, he and petitioner never married. They spent their entire time together in California, except for a three-month vacation in Nevada (*ibid.*).

The couple had three children, and on each birth certificate the father was listed as Amadee Powell and the mother as Mary Stewart (Ct. App. Rec. 46-47). Although they filed joint state and federal tax returns, these returns were signed by Mr. Powell, with no signature in the space provided for "Spouse's signature" (Ct. App. Rec. 52). Mr. Powell's death certificate lists his marital status as "Single" (Ct. App. Rec. 64, 71).

After Mr. Powell's death, petitioner filed an application for death benefits for herself and her three children pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*[1] The insurance carrier stipulated to the children's entitlement, but contested petitioner's; consequently a hearing was held to determine whether petitioner was the widow of Amadee Powell within the meaning of the Act. The Deputy Commissioner, respondent William K. Rogers, held that since the couple had never been ceremonially married, nor had cohabited in a state which recognized common law marriage, petitioner does not qualify as the widow of Amadee Powell (Pet. App. III). The district court and court of appeals affirmed (Pet. Apps. I and II).

ARGUMENT

33 U.S.C. 902 provides in pertinent part:

> (16) The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

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[1]Under the Act a representative of the Deputy Commissioner holds a hearing to determine a plaintiff's entitlement. 33 U.S.C. 919. That decision is then subject to judicial review in which the Deputy Commissioner is named a statutory respondent. 33 U.S.C. 921. Since the proceeding in this case, the statute has been amended to provide administrative review by a Benefits Review Board followed by direct review in a court of appeals. Pub. L. 92-576, 86 Stat. 1261-1262 (Oct. 27, 1972), 33 U.S.C. (Supp. II) 921.

Petitioner contends that she fits within this statutory definition because she was dependent upon the deceased and had established a long and stable relationship with him.[2] The statutory standard of dependency, however, modifies the word "wife" and does not create an additional basis for establishing widowhood. Thus, under the Act, the determination of whether a woman is a widow is contingent upon whether she was a wife, and this is determined under local law. *Bolin* v. *Marshall*, 76 F. 2d 668 (C.A. 9), certiorari denied, 296 U.S. 573. Consequently, where a "common law" marriage is not possible under state law, a "common law wife" is not entitled to compensation under the Longshoremen's and Harbor Workers' Compensation Act as the deceased employee's widow. *Bolin* v. *Marshall*, *supra*. In the instant case, neither California nor Nevada, the two states in which the couple lived together, recognizes common law marriage. Cal. Civil Code, 4100 (West 12A); 5 Nev. Rev. Stat. 122.010.

Petitioner's reliance on *Thompson* v. *Lawson*, 347 U.S. 334, for the proposition that a "conjugal nexus" is sufficient to establish statutory entitlement, is misplaced. In *Thompson* this Court held that the abandoned legal wife of the deceased employee was *not* entitled to widow's benefits under the Act since she was not dependent upon him for support nor living apart from him for justifiable cause or by reason of his desertion. Thus, although his legal wife, she did not fit within the statutory criteria. *A fortiori*, where claimant is not even the legal wife, she cannot meet the statutory definition.

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[2]Pursuant to 33 U.S.C. 909(b), the combined widow's and children's benefits cannot exceed 66 2/3% of the deceased employee's wages. Mr. Powell's three children were awarded benefits totalling 65% of his weedly wage (Pet. App. III, p.3). Accordingly, petitioner is seeking only 1 2/3% of Mr. Powell's wage.

2. Finally, there is no merit to the argument that because petitioner is black and was dependent on the decedent her entitlement to widow's benefits should be based solely on dependency rather than on whether she was legally married, as required by the Act. Under the controlling definitional sections of the Act, dependency, in the absence of a legally recognizable husband-wife relationship, is not a sufficient basis for the award of widow's benefits.

Nor is there any constitutional infirmity in conditioning workmen's compensation benefits for a person claiming to be a spouse on the existence of a legally recognizable marriage. Such persons, unlike illegitimate children, can bring their relationship under the protection of the law by marrying. See *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 170; *Glona* v. *American Guarantee Co.*, 391 U.S. 73, 81 n. 9 (Harlan, J., dissenting). The instant case is thus, also, fundamentally unlike *Jimenez* v. *Weinberger*, No. 72-6609, decided June 19, 1974. In that case the Court struck down a provision of the Social Security Act which granted or denied benefits to dependent illegitimate children on the basis of their right to inherit under state law. The Court found that the distinction bore no rational basis to the scheme of the statute (slip op. pp. 7-9). Here, Congress in extending benefits to widows reasonably insisted that, as a first requisite, they be persons married to the decedent—by whatever form of marriage the state law (which governs marriage) permits. A widow, unlike a child, is only related to the decedent through the operation of law. It is thus rational for Congress to require such a nexus, and not simply dependency, as a requisite for receiving benefits under the Act.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.